TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 141.

SARA GALLARDO Y SEARY, ESTEFANIA VARONNE, CELESTINA GALLARDO Y VARONNE, AND EVA GALLARDO Y VARONNE, APPELLANTS,

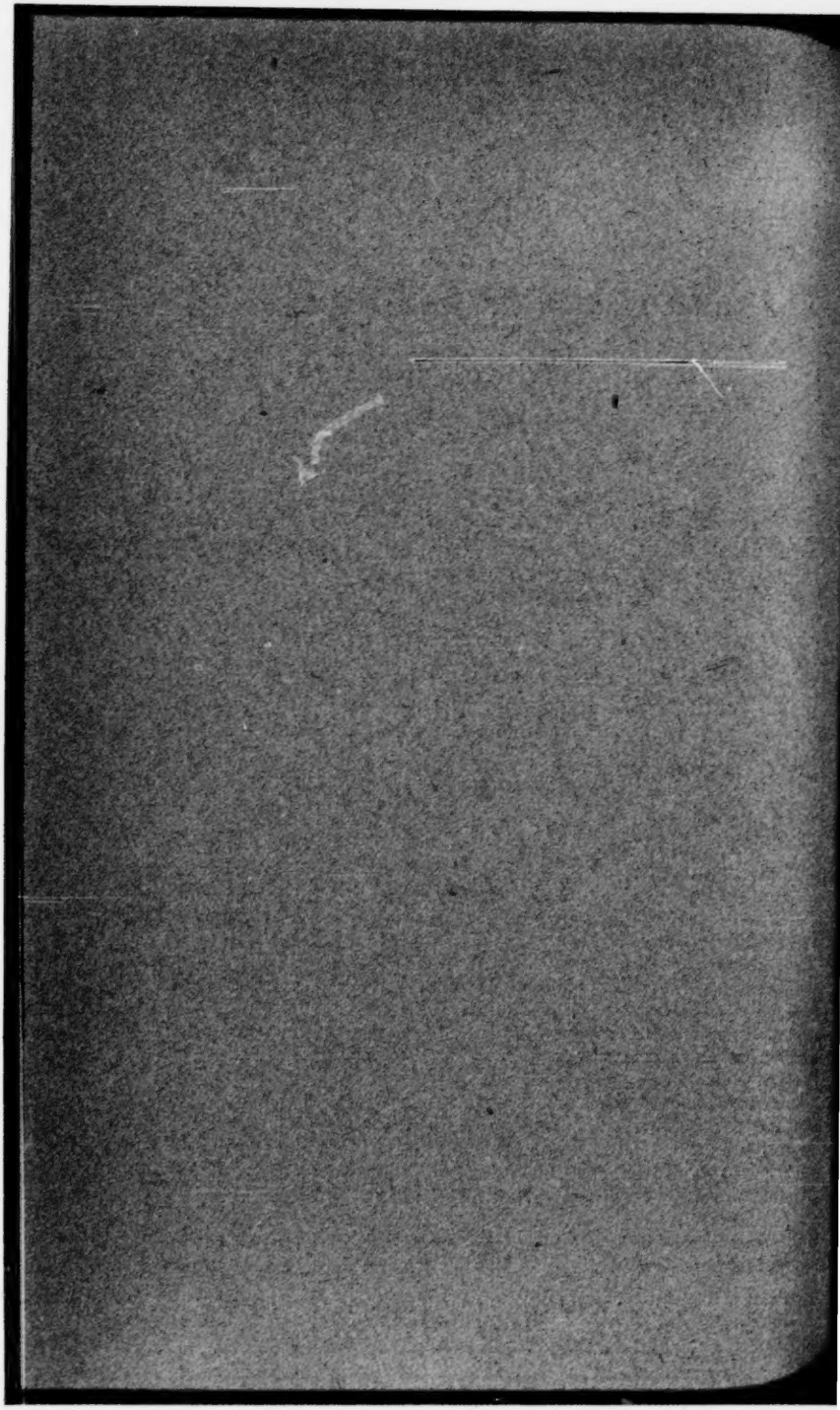
vs.

JAMES R. NOBLE, WILLIAM D. NOBLE, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

FILED APRIL 9, 1915.

(23,617)



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1 In the District Court of the United States for Porto Rico.

Filed January 9, 1908.

To the Honorable Bernard S. Rodey, Judge of the United States District Court for Porto Rico, in chancery sitting:

Josefa Ruiz de Noble, James R. Noble, William D. Noble, Sara Isabel Noble de McCormack, Arthur H. Noble, Josefa B. Noble and Maria T. Noble, who are all aliens and subjects of the King of England, bring this their bill of complaint against Eliza Gallardo y Seary, Estefania Varonni, Celestina Gallardo y Varonni and Eva Gallardo y Varonni, defendants, who are citizens and residents of Porto Rico.

And thereupon your orators aforesaid complain and say: That during and prior to the year of our Lord 1865 one Ramon Ruiz Gandia, since deceased, was the owner of an undivided interest in a certain sugar estate or plantation in the jurisdiction of Loiza in the island of Porto Rico, called "San Jose Cacique," and was at the same time in possession and control of the whole of said plantation by virtue of a lease of the remaining interest therein from his co-owners, Doña Amalia Seary, Don Ricardo Gallardo and Don Jorge Seary, and so remained during the time of the continuance of the contract of refaccion hereinafter set forth.

Your orators further allege that on the 22nd day of December, A. D. 1865, the said Ramon Ruiz Gandia executed in favor of the ancestor of your orators, William Noble, before the Public Scrivener, Jóse Celestino Schroeder, a deed of acknowledgment of a mortgage lien, wherein it was stated and admitted that, as a result of an accounting had between said Ramon Ruiz Gandia and said William Noble, the former was indebted to said Noble in the sum of
2 16,186 escudos of the money then in circulation, which was the equivalent of $8,093, for the support and refaccion of said plantation from the year 1863 to that time, which said Ruiz was unable then to pay on account of the failure of the crops; that he thereby agreed to pay said indebtedness from the proceeds of the first corps made after the first of January of the following year, after deducting the proportion necessary for current expenses of the plantation; and that for the security of such payment said Ruiz in addition to the general lien upon all his property which the law then gave for such debts granted a special mortgage not only upon the products of the next crop but upon all following crops until said mortgage debt was wholly extinguished and stipulated that said deed should be recorded in the then registry of mortgages so that it might have all its legal effects as such a lien; all of which will more fully appear from a true and correct copy of said deed which is herewith filed marked "Exhibit A" and prayed to be taken as a part of this bill of complaint, together with a correct translation of the same into the English language.

Your orators further allege that the said provision contained in

said deed providing for its registry in the then existing book of Mortgages was made in pursuance of the law then in force in Porto Rico to the effect that such indebtedness should be liquidated as to its amount by public document which might, when so liquidated, be recorded and should thereupon become a lien upon the land therein described and against which it was so recorded; and that, in pursuance of said law, the said deed was so recorded in the old "Anotaduria," in book 20, folio 7, No. 11.

Your orators further allege that said plantation "San Jose Cacique" at that time consisted of eight hundred and thirty-eight cuerdas of land within the barrio of the town of Loiza, having thereon two dwelling houses and various buildings composing a sugar factory, and was described at that time as bounded as follows:

3 on the North, by the settlement called Las Cuevas and the farms of the Mediania belonging to various owners; on the South, by the lands of Ricardo Gallardo, of Pablo Ubarri and of Antonio Garcia Revollego; on the East by the lands of Cecilio Lopez and of said Pablo Ubarri; and on the West by the Rio Grande de Loiza and other lands of the same Gallardo.

Your orators further allege that thereafter and about the year 186- the said Ramon Ruiz Gandia, being unable to pay his debts, was declared a bankrupt; and that afterwards, upon a settlement of the bankrupt estate, the above mentioned Ricardo Gallardo, one of the co-owners in said plantation with said Ruiz, acquired title thereto, but subject to various liens in favor of different persons and among them the lien of said William Noble as hereinbefore set forth; that thereafter said Gallardo obtained from the proper court a possessory title as owner of said plantation and, upon applying for the registry of said title in the year 1882, he was required to recognize as valid liens and agree to pay all such liens as appeared against said plantation upon the books of the old Registry, among which was the lien hereinbefore described; and that the validity and existence of said indebtedness and its lien upon said plantation was so recognized by said Gallardo, as appears duly noted in said Registry in Book 2 of Loiza, folio 2, estate No. 48, first inscription.

Your orators further allege that neither the principal sum of the indebtedness hereinbefore described, nor any part thereof, nor any interest thereon, was ever paid to said William Noble in his lifetime nor to anyone in representation of heir heirs since his death, but that the whole amount thereof still remains due and unpaid and, with its interest, constitutes a mortgage lien upon the said plantation "San Jose Cacique" as above described; and that said Notarial Deed

4 marked "Exhibit A" and containing the conclusive proof of the continued existence of said indebtedness and lien was duly presented in the present Registry on the 9th day of April, A. D. 1906, as appears from the indorsement of the Registrar thereon.

Your orators further represent that the said William Noble died, leaving a last will and testament under the provisions of which, and of the partition of inheritance made thereunder, your oratrix Josefa Ruiz de Noble, who is his widow, and the remaining complainants,

who are his children, are jointly interested as his heirs as owners of the indebtedness hereinbefore described.

Your orators further represent that the said Ricardo Gallardo remained the owner of said plantation until his death, at which event he left two children, the defendant Eliza Gallardo y Seary and Felix Gallardo y Seary; that the latter has since died leaving as his heirs a widow, the defendant Estefania Varonni, and two children, the defendants Celestina and Eva Gallardo y Varonni; and that said defendants to this bill of complaint are now in possession and enjoyment of the plantation above named as heirs of the said Ricardo Gallardo, claiming to be the joint owners thereof.

Your orators further allege that in the year 1883 and during the lifetime of said Ricardo Gallardo the latter executed a further Notarial instrument wherein he recognized the validity and existence of the said indebtedness hereinbefore described and of the lien thereof upon said plantation; and that by said repeated recognition of the same the running of the statute of prescription has been interrupted, and therefore said indebtedness and the right of complainants to foreclose their lien therefor upon the plantation "San Jose Cacique" aforesaid is a valid and subsisting right, of which your orators may, and do hereby avail themselves in this court of equity where matters of such character are peculiarly cognizable.

Forasmuch, therefore, as your orators can have no ade-
5 quate relief except in this court of equity, and to the end that the above named defendants may, if they can, show why your orators are not entitled to the relief hereby prayed, and may be required to make answer to this bill of complaint—but not under oath, the answer under oath being hereby expressly waived; that the amount now due to your orators, as the heirs of said William Noble, for principal and interest upon the indebtedness set forth and determined in said document marked "Exhibit A" may be fixed and decreed by, or under the authority of, this honorable court; that the amount, when so fixed, may be decreed to be a lien upon said plantation "San Jose Cacique" and foreclosed as such in this suit; that, in default of the payment to complainants of whatever amount may be so decreed to be due, within a short day to be fixed by the court, said plantation may be decreed to be sold at public auction to satisfy the same; that, in case of such sale, the defendants herein and all persons claiming through and under them since the commencement of this suit, and all other persons though not parties to this suit, who have or claim any liens of any kind upon said described premises subsequent to the recording in the old registry of the lien under said contract, may be barred and foreclosed of all right or equity of redemption in said premises; and that your orators may have such other and further relief in the premises as equity may require and to your Honor may seem meet;

May it please your Honor to grant unto your orators a writ of subpœna in chancery, directed to the said Eliza Gallardo y Seary, Estefania Varonni, Calestina Gallardo y Varonni and Eva Gallardo y Varronni, defendants herein, commanding them, on a day certain therein to be named and under a certain penalty therein to be expressed, to be and appear before this honorable court and then and

there full, true, direct and perfect answer make to this bill of complaint, and stand to and abide by such orders and decree as the court may make in the premises.

6 And your orators will ever pray etc.

(Signed) R. H. TODD,
" N. B. K. PETTINGILL,
Solicitors for Complainants.

7 In the District Court of the United States for Porto Rico.

Filed January 22, 1908.

Translation.

Number One Hundred and Fifty-six.

Mortgage Obligation.

In the town of Naguabo, Province of Porto Rico, on the 22d day of December, 1865, before me, the undersigned public scrivener of this district and before the witnesses to be mentioned, there appeared Don Ramon Ruiz, a resident of Loiza, of whose acquaintance I hereby certify, and stated: that by a liquidation made on this date between himself and Mr. William Noble, a property owner of this district, it showed that the former owed the latter the sum of Sixteen Thousand one Hundred and Eighty-six Escudos (8093 pesos) which he has been supplying him up to this date since the year 1863 to the present inclusive for the payment of the lease on the "San Jose Cacique" Estate, situated in the aforesaid town of Loiza, and by reason of not being able to grind the crop of this last year, for causes not unknown to Mr. Noble, he has not been able to pay off said account; therefore, and wishing to carry into effect this agreement in the way and form more suitable in law, he states: that he acknowledges and confesses to be real-y and effectively the debtor of the above mentioned Mr. William Noble, in the above mentioned sum, for the reasons given. And in as much as the delivery of the money is not made in my presence for the aforesaid reasons, the receipt thereof being true, he hereby renounces the exception of money not counted, of the new law, title one, fifth partida, which refers to same, and the two years granted by the same law to present said exception, which he hereby grants as if they had ellapsed. He therefore binds himself to pay the above mentioned sum to his

8 creditor Noble, with the proceeds of the first crops which may be ground from next January thereafter at the said San Jose Cacique Plantation; and there resulting from the liquidation made by the appearing party hereto, Ruiz, with Mr. Jose Rufino Goenaga in November last, that the former was indebted to said gentleman in the sum of two thousand Escudos (1,000 pesos), this must be paid during the month of October of next year 1866, thereby being cancelled that deed of refaccion, and Ruiz obliged not to execute any other agreement or deed with damage to this present one

wherein there will be annulled and without effect whatever, that which he may execute in the future; this without prejudice of deducing also the ordinary and indispensable expenses for the maintenance, and development required by the said Plantation by reason of the necessary refaccion and other expenses. For the better security of the aforesaid, besides the general obligation which he hereby makes of all his property hindering the special obligation, neither the special hindering the general, the appearing party hereto mortgages expressly and especially not only the canes which may be ground in the next crop by the "Cacique" Plantation, situated in the jurisdiction of Loiza as aforesaid, but also those which it may grind in the following crops until the complete payment of the amount herein acknowledged; allowing that the opportune annotation be taken of this instrument by the Register of Mortgages of this district, within the legal time of thirty days, of which obligation and its effects, I the Scriverner notified the parties hereto.

To the fullfilment of all that has been set forth in the present deed, the appearing party hereto affects his present and future property, with the clause which allows the courts to have same executed, executory contract, submission and renouncing all laws and rights in his favor, as well as that which prohibits the general law as to form.

9 It was thus stated by him and he signed same, being present witnesses and residents herein Don Roque Diaz, Don Joaquin Porrata and Don Ramon Muñoz, of all of which I hereby certify. Signed: Rn. Ruiz Gandia—Scrolled: Jose Celestino Schroder. Public Scriverner.

Mr. Antonio de Aldrey y Montolio, Notary of the Island of Porto Rico, General Keeper of the Records of Protocols of the District of Humacao, with domicile, residence and open office in this City, do hereby certify:

That the preceeding is a true and faithful/ copy of the original document which is to be found in the Protocol of this Notarial office under my charge.

In witness thereof and at the request of Mr. William D. Noble, I issue the present copy to which I attach my mark, signature and scroll on two sheets of Notarial paper of my use, as well as a fifty cents stamp, as provided by the Hollander Bill, leaving an annotation as to the issuing of this copy, at Humacao, Porto Rico, August 4, 1905.

(Signed) ANTONIO DE ALDREY, *Notary.*

There is a 50¢ stamp and a seal.

Entered in the annotation letter A of property number 48, page 4 turned, of volume 2° of Loiza.

San Juan, Porto Rico, April 9, 1906.

[SEAL.] (Signed) The Registrar, JOSE BENEDICTO.

10 In the District Court of the United States for Porto Rico
Sitting at San Juan.

(Filed June 14, 1912.)

JOSEFA RUIZ DE NOBLE et al., Plaintiffs,
vs.
ELISA GALLARDO SEARY et al., Defendants.

Demurrer and Plea to the Bill of Complaint.

The Demurrer and plea of Elisa Gallardo y Seary, Estefani Veronne, Celestina Gallardo y Veronne and Eva Gallardo y Veronne, Defendants, to the bill of complaint of Josefa Ruiz de Noble et al., the Above-mentioned Plaintiffs.

First. These defendants respectively, jointly and severally, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged demur to the whole of said bill.

And for cause of demurrer show:

1°. That it appears by the plaintiffs' own showing by the said bill that he is not entitled to the relief prayed by said bill against these defendants.

2°. That it appears from said bill of complaint of plaintiffs that this Court has no jurisdiction to hear and determine this action.

11 3°. That said bill of complaint of plaintiffs is wholly without equity.

Second. And the said defendants not waiving their said several demurrers, but wholly relying thereon as to the whole of the said bill, do plead thereto and for plea, to the whole of said bill, say:

That the cause of action herein, if any ever existed, which defendants deny, accrued in the year 1865; that said cause of action, if any ever existed, which defendants deny, is a demand that has long time since been and is now barred and is extinct by law and specially by Art. — of the Mortgage Law of May, 1880; Article 134 of the Mortgage Law of May 26th, 1893, and Articles 1864, 1865, clause 3 of Art. 1867, and 1840 of the Civil Code now in force in Porto Rico, and by Articles 1963, 1964, clause 3 of 1966 and 1939 of the Civil Code of Porto Rico of 1889.

That the plaintiffs ought not to have or maintain their suit herein for that if any cause of action ever existed against these defendants, or any of them, the same accrued *mora* than thirty, twenty, fifteen and five years respectively prior to the time of the bringing of this suit, and this the defendants are ready to verify.

All of which matters and things these defendants do aver to be true, and they pray the judgment of this Hon. Court whether they

shall be compelled to make any further answer to the said Bill and pray to be hence dismissed with their reasonable costs and
12 charges in this behalf most wrongfully sustained.

San Juan, P. R., June 13, 1912.

(Signed) MIGUEL GUERRA,
Attorney for Defendants.

I, Estefania Veronne, being duly sworn, on my oath depose and say that I am one of the defendants in the above entitled case; that the foregoing demurrer is not interposed for delay and that the same is true in point of fact, and that the allegations in the foregoing plea are true.

(Signed) ESTEFANIA V. DE GALLARDO.

Subscribed and sworn to before me this the 14th day of June, 1912.

(Signed) GABRIEL GUERRA,
[NOTARY'S SEAL.] *Notary Public.*

I hereby certify that in my opinion the foregoing plea is well founded in point of law.

(Signed) MIGUEL GUERRA.
[NOTARY'S SEAL.] *Attorney for Defendants.*

13 *Order Overruling Demurrer & Plea and Granting Leave to Plead.*

In the District Court of the United States for Porto Rico.

(Journal Entry, June 20, 1912.)

JOSEFA RUIZ DE NOBLE et al.
vs.
ELIZA GALLARDO Y SEARY et al.

The demurrer and the plea filed by the defendants in the above entitled cause, are heard by the Court and after being duly considered, same are overruled, and said defendants have leave to renew same or to answer until Wednesday, July 10th, 1912, to which action of the Court, defendants duly object and except.

14 In the District Court of the United States for Porto Rico.

Filed July 11, 1912.

No. 524, San Juan.

JOSEFA RUIZ DE NOBLE et al.
vs.
ELISA GALLARDO et al.

Order pro Confesso.

It appearing that all the defendants in this cause have heretofore, after other pleadings herein, filed their demurrer and plea to the bill of complaint of the complainants; that said demurrer and plea came on to be heard as to their sufficiency and were heard before this Court on the — day of June last; and that upon such hearing the same were overruled and said defendants given until the 10th day of July, 1912, to file further pleading or defence in said cause;

And it further appearing that said 10th day of July, 1912, is now passed and said defendants herein, and each of them, have not further pleaded in compliance with said order of the court, and have wholly failed to make any further defence to the complainants' said bill of complaint within the time limited by said order;

Now, therefore, on motion of N. B. K. Pettingill, Esq., solicitor for complainants, it is ordered that the bill of complaint in said cause be taken pro confesso as to all the defendants therein, in accordance with the Rules of Equity in such cases made and provided, and that said complainants have leave to proceed herein ex parte.

San Juan, Porto Rico, July 11, 1912.

(Signed) N. B. K. PETTINGILL,
Solicitor for Complainants.

15 In the District Court of the United States for the District of Porto Rico.

(Filed Nov. 8th, 1912.)

JOSEFA RUIZ DE NOBLE et al., Plaintiffs,
vs.
ELISA GALLARDO Y SEARY et al., Defendants.

Application of Defendants to Set Aside Order pro Confesso Entered Herein.

To the Hon. Paul Charlton, Judge of said Court:

Now come respondents herein by their attorney Miguel Guerra, and respectfully represents:

That said respondents interposed and filed their plea and demurrer to the complainants' bill on the 14th day of June, 1912; that the hearing on said plea and demurrer was held before Your Honor at Chambers, on the 20th day of June, 1912, and that on this last mentioned day the following order was given by Your Honor:

"The demurrer and the plea filed by the defendants in the above entitled cause, are heard by the Court, and, after being duly considered, same are overruled, and said defendants have leave to renew same or to answer, until Wednesday, July 10, 1912."

That said respondents have not filed their answer for the reasons more fully specified in the affidavit of merits attached hereto; that complainants herein entered a pro confesso order on the 11th
16 day of July, 1912; that respondents herein now do tender their answer, and beg to renew their plea and demurrer filed as aforesaid; that the said respondents do hereby offer to pay plaintiffs herein whatever costs and expenses said plaintiffs may have incurred since the filing by said respondents of their demurrer and plea, and to restore to plaintiffs any substantial benefit accruing under the said order pro confesso.

That respondents have a meritorious and just defense, and that it would further the ends of justice that they, the said respondents, may be allowed to file their answer and to renew their said demurrer and plea.

That this is a very important case, involving a large amount of property, and that it would be equitable to allow respondents to plea-.

That the Court, prior to the departure of the judge thereof to the United States, was busily engaged in various important matters concerning the different corporations which at the time were put in the hands of receivers, and the undersigned being engaged also in the Solá é Hijo bankruptcy proceedings, could not bring this matter to the attention of the Court.

Wherefore, respondents pray that Your Honor set aside the said Order pro confesso and grant them leave to file their answer and to renew their demurrer and plea.

(Signed) MIGUEL GUERRA,
Attorney for Respondents.

17 In the District Court of the United States for the District of Porto Rico.

(Filed Nov. 8, 1912.)

JOSEFA RUIZ DE NOBLE et al., Complainants,
vs.
ELISA GALLARDO Y SEARY et al., Respondents.

Affidavit of Merits.

Before me appears Miguel Guerra, who, being first duly sworn, deposes and says:

That he is the attorney for respondents herein.

That ever since the date this Hon. Court overruled said respond-

ents' demurrer and plea, to wit, on the 20th day of June, 1912, deponent has persistently searched in the files of the Insular Court of San Juan for the records pertaining to the bankruptcy proceedings instituted against one Ramon Ruiz Gandia, from the years 1866 to 1883, both inclusive, to obtain data sufficient to enable himself to answer paragraph 5 of complainants' bill of complaint, and to conscientiously meet each and all of complainants' allegations as to facts arising out of said bankruptcy proceedings. Deponent says that in spite of all his diligence and of the labor and time he spent personally searching and looking through a voluminous number of old "expedientes," he, deponent, was unable to find any records throwing any light upon the said bankruptcy proceeding alluded to in said complainants' bill. Deponent says that said proceed-
18 ings were actually instituted in some court in this Island of Porto Rico, some time between the years 1866 and 1883; that deponent, although having in his possession evidences of some of said proceedings, was utterly devoid of all the necessary data to properly draw an answer that would meet each and every allegation of complainants' bill of complaint; that deponent has used all reasonable diligence in procuring the said records; that the demand which is the subject matter of this suit and the cause of action therein stated, accrued as far back as 1863, over forty-nine years ago; that none of the respondents herein have ever intervened or taken any part in any of the transactions alleged in complainants' bill; that defendants herein were scarcely in possession of any data throwing any light on this suit, as to their defense; that deponent has had to personally go through the old archives of San Juan searching for all records bearing any light and weight upon the allegations of complainants' bill; that deponent has even searched, personally, the archives and files of the Insular Court of Humacao, without avail; that deponent has spent much time inspecting old records, deeds and entries in the Registry of Property of San Juan, all but to obtain a slight part of the data that must exist somewhere in some old registry or archive.

That by virtue of the said order of this Court, overruling the said demurrer and plea of said respondents, the same were given leave to file their answer or renew their said plea and demurrer up to the 10th day of July, 1912; that on or about the 8th day of July, 1912, deponent personally and verbally asked the Hon. Paul Charlton, Judge of this Court, for an extension of time to file the answer in the above entitled suit, for the reason, as aforesaid, that he, de-
19 ponent, had not been able, up to that time, to obtain data sufficient to draw an answer that would meet the allegations of complainants' bill; that thereupon, the said, the Hon. Paul Charlton, told deponent that he would speak to Mr. N. B. K. Pettingill about the said extension of time. That deponent, having brought to the attention of the Court that fact that he desired an extension of said time to answer, felt as if no formal petition was necessary to attain the said end; that from the said day, to wit, on or about July 8, 1912, up to the return of the said Hon. Paul Charlton, deponent did not bring up the said question about extending the time to

answer, because the Court was busily engaged in the case of Solá é Hijo, S. en C., and the Borinquen Sugar Company, pending before this Court, and because of the reason that the Court was in recess during the absence of the Judge thereof. That after the return of the Honorable Judge of this Court from the United States, deponent spoke to him in regard to the order pro confesso entered herein, and deponent was unable to bring up the question before the Court on account of the same being engaged in various other important matters.

Deponent states that the so-called mortgage which complainants herein are endeavoring to collect and foreclose as against these respondents, is not a mortgage, and was never a mortgage in accordance with the laws of Porto Rico now in force or those in force at the time the said alleged lien was created; that the said lien was only one upon the products of the lands in question, and not upon the realty itself; that the said lien was never recorded as weighing upon the lands of the "San Jose del Cacique" estate; that complainants herein presented in the Registry of Property of San Juan the deed, "Exhibit A" for the complainants, wherein and whereby the said alleged mortgage was created, for the proper registration
20 thereof, on the 9th day of April, 1906, that said pretended mortgage might have legal force and effect; and deponent says that on the said date, to wit, the 9th of April, 1906, the Registrar of Property of San Juan refused and denied to complainants herein the registration and inscription of the said deed,—Exhibit A for the complainants filed herein,—for the reasons which, literally copied, read as follows:

"Taking into consideration that the existing inscription in the old registry, the transfer of which is asked for, only affects the products which are manufactured at the San Jose del Cacique hacienda, the same not constituting a lien upon the realty, and although said lien is mentioned as a mortgage, among the other encumbrances upon the estate, said mention cannot be given any other — greater force or effect than that which the old inscription gives it; taking into consideration the fact that the said property, inscribed in favor of Don Ricardo Gallardo, is not mortgaged * * * I deny the transfer asked for. * * *"

That the above copied paragraphs relate to the mortgage alleged in complainants' bill and refer to the estate therein mentioned.

Deponent states that complainants herein have not availed themselves of the remedy the law grants them, of appealing to the Supreme Court of Porto Rico from the decision of the Registrar of Property of San Juan, partly above transcribed, and that the said decision of the said Registrar is final as to their pretended mortgage.

Deponent states that respondents' ancestor, the said Ricardo Gallardo, paid the amount the said Ruiz Gandia owed to com-
21 plainants' ancestor, to the trustees of the bankrupt estate of said Ruiz, by deed executed before the Notary Don Demetrio Gimenez y Moreno, on the 10th day of August, 1883.

Deponent states that his failure to renew the plea and the demurrer filed as aforesaid, is due to the fact that deponent assumed

that it was not necessary to refile the same in order to have the same brought up for final discussion and consideration.

(S'g'd) MIGUEL GUERRA.

Subscribed and sworn to before me this 8th day of November, 1912.

(S'g'd) RAFAEL GUILLERMETY,
[SEAL.] *Clerk U. S. District Court of Porto Rico.*

22 (Filed Nov. 30, 1912.)

The Registrar of Property of San Juan, Section 1.

Carlos Pesquera as verbal mandatory of Doña Estefania Veronne sets forth:

That my constituent would like to obtain a certificate in relation to the liens and incumbrances laid upon the property called San Jose del Cacique, inscribed in favor of Don Ricardo Gallardo at folio 2 of volume 2 of Loiza, property number 48 first inscription.

Likewise he requests that a literal certified copy be issued of the entry letter "A" which appears in the subsequent inscription for the same property and volume.

Porto Rico, November 20, 1912.

CARLOS PESQUERA.

23 Registry of Property, Section One, San Juan, P. R.

Jose S. Belaval, Registrar of Property of San Juan, Puerto Rico, Section One,

Certify, in compliance with the preceding request, that at folio 4, volume 2, of Loiza, property number 48, there appears an entry marked letter "A" which literally copied reads as follows:

"A" Rustic.—Sugar cane plantation, called "San Jose de Cacique" in the ward of the town of Loiza, whose description and liens appear from the preceding inscriptions. Mr. David Noble y Ruiz, as general attorney in fact for the succession of his father Don Guillermo Noble, in a petition hereinafter to be mentioned, has requested the transfer to this Modern Registry of Property of the entry made at folio 7, number 11, of Book 20 of the Old "Anotaduria" of Mortgages, wherein it appears that Don Ramon Ruiz, neighbor of Loiza, by deed executed in the town of Naguabo, on the 22nd of December 1865, before the Public Scrivener of that place Don Jose Celestino Schroder, constituted himself as debtor to Don Guillermo Noble, of that vicinity, in the sum of sixteen thousand one hundred and eighty-six "escudos" crowns, current money, which he bound himself to pay with the proceeds of the crops of the cane plantation called "San Jose de Cacique" situated in the municipality of Loiza, and as security thereof he especially encumbered the products manufactured in said mill, from January the 2nd, 1866 and thereafter, under the condition that the same could not be sold, encum-

bered nor mortgaged in favor of any other party, or else it should be held void; and in another petition dated March 29th last, Doña Josefa Ruiz y Gandia, widow of Don Guillermo Noble, of full age, of this vicinity, in her own right as such widow, and besides as heir of her son Don Carlos Manuel Noble y Ruiz; Don Arturo H. Noble y Ruiz, single, property owner, of legal age, and resi-
24 dent of this city, by himself and as attorney in fact for his sisters Doña Josefa Barbara, Doña Maria Teresa and Doña Sara Isabel Noble y Ruiz, and Don Guillermo Noble y Ruiz, single, and Don Jaime R. Noble y Ruiz, married, of full age and of this vicinity in their own right, and all of them as sole members of the succession of Don Guillermo Noble, approve and ratify the petition wherein said transfer is prayed for, and make a similar petition the same as though it had been subscribed by them, accompanying to said petition of ratification an affidavit signed before the Notary Don Julio Cesar Gonzalez, by Mr. A. H. Noble, on the 31st of the month of March aforesaid, affirming that he is the attorney in fact for said succession of Don Guillermo Noble, composed of his widow, Mrs. Josefa Ruiz Gandia, and her children Don Jaime R. Doña Sara Isabel, Doña Josefa Barbara, Doña Maria Teresa and Don Guillermo Noble y Ruiz, which petition of ratification is signed by Doña Josefa R. de Noble, Don A. H. Noble, and J. R. Noble. In virtue thereof, and observing that the entry existing at the old "Anotaduria" the transfer of which is sought for, only affects the products to be manufactured in the plantation "San Jose Cacique", not constituting a lien upon the property, and although it is mentioned as a mortgage in the section of encumbrances upon the property of this number it cannot be given to that reference a wider scope than that of the old entry; that in the first inscription in favor of Don Ricardo Gallardo, it does not appear that he had mortgaged said property, nor the portion which he purchased from the Trustees of the estate of the bankrupt Don Ramon Ruiz, to answer for the amount which the latter owed to Mr. Noble, which does not appear either from the documents which they have produced, so the transfer requested is denied, and I issue in lieu therof this cautionary notice, for the period of time provided by law, in favor of Don Guillermo Noble.

25 All of the above appears from the Registry and from the petition hereinbefore mentioned, signed on the 12th of January last, by Mr. David Noble y Ruiz, from a copy of a deed executed in the town of Naguabo on the 22nd of December 1865, before the scrivener Don Jose Celestino Schroeder, whereby it is constituted the obligation which caused the old entry aforesaid, the said copy having been issued by the Notary Recorder General of Protocols of the District of Humacao Don Antonio de Aldrey, on August 4th, of the last year; from a copy of the power of attorney granted by Doña Josefa Ruiz de Noble, Don Jaime, Doña Sara Isabel, Don Arturo H. Doña Josefa B. and Doña Maria T. Noble y Ruiz, in this city on the 10th of October ultimo, before the Notary Don Damian Monserrat, to Don Guillermo D. Noble y Ruiz; and from a copy issued by the Notary General Recorder of Protocols of

this District, Don Santiago R. Palmer, on the 17th of said month of October: from a deed number 266 dated August 10th, 1883, executed in this city before the Notary Don Demetrio Gimenez y Moreno, whereby Don Juan Emilio Turull y Amadeo, and Don Jose Pacreco, executed acquittance for the sum of sixteen thousand and eighty three crowns (escudos) eight hundred and eighty thousandths, being the amount of a mortgage credit which appears in said first inscription of this number in favor of the former, which was included among the claims against the bankrupt estate of Don Ramon Ruiz, of which Messrs. Turull and Pacheco were trustees, the said notice being in favor of Don Juan Emilio Turull and not of Don Juan Emilio Turull y Amadeo, as has been expressed, all of which documents have been produced at this Registry on the 24th of February of the present year, it also appearing from the deed of ratification and affidavits above mentioned, and from the copy of the deed of inventory and partition of the inheritance left by Don Guillermo Noble dated October 5th, 1886, executed in Humacao, before the Notary Don Marcelino Estebanez Manclares, which said copy was issued on the 22nd of the same month and year by
26 the subscribing notary inserting therein the testament and codicil of Mr. Noble dated respectively December the 7th, 1881 and December 15th, 1882, both executed in the ward of Daguao of Naguabo, before the Notary Don Eugenio de Torres y Ramos, which documents have been also produced at this office on the 2nd inst. And the above being in conformity with the Registry and documents referred to, I have hereunto set my hand in San Juan Bautista de Puerto Rico, on the 9th of April 1906—Jose Benedicto.

On the margin of annotation letter "A" inserted above, there appears the following note:

Cancelled entry letter "A" in front, the term for which it was issued having expired without having correct- the defects which caused it.—San Juan, P. R. November 27, 1912.—Belaval.

The entry and note copied are in conformity with their respective originals to which I refer.

That the description to which this property refer-ed is as follows:

Sugar cane plantation called San Jose de Cacique, in the ward of Pueblo in the municipality of Loiza, composed of eight hundred and thirty-eight cuerdas of first and third class land equivalent to 329 hectares, 37 areas, 75 centiares, containing besides two dwelling houses thereon, one of which has its first floor of masonry and the top floor of wood, zinc roofed, and the other a one story house of wood, with the same class of roof, sugar mill, and distillery, of masonry and wood, roofed with shingles and zinc. It is bounded on the North by the village of Las Cuevas, owned by Don Felipe Moreno, Patricio Davila, Jacinto Rivera and Fabian Fuentes, and the farms of the Medianias of Don Javier Zequiera, Doniel Zavallos, Petrona Ferrer, Jose Pizarro, Placido Ferrer Tomas Velasquez, Eugenio Andrade, Aniceto Pizarro, Pedro Pablo Ferrer, Tomas Ferrer, Pedro Boria, Celestino Mojica Felipe Ayende, Fabian Fuentes and Francisco Torres, on the South by other lands belonging to

Don Ricardo Gallardo, those of Don Pablo Ubarri, and those
27 Don Antonio Garcia Rebolledo, represented by Don Javier Zequeira, on the East by lands of Cecilio Lopez and those of Don Pablo Ubarri and on the West by the Rio Grande de Loiza, and others of the said Gallardo, said property having an easement constituted by the vicinal road of Canovanas which crosses it.

That the above described property, the possession of which is now inscribed in favor of Ricardo Gallardo y Rivera, at folio 2, of volume 2 of Loiza, property number 48—inscription first, is subject to the following incumbrances:

First. To the mention of the following incumbrances: One "censo" for six hundred and twenty five pesos at five per cent. per annum in favor of the Convent of the Carmelite nuns of this city, recognized in the title presented for the said first inscription inscribed at folio 119 over, number 447 book 3 of the Old Registry. "B" one" refaccion loan for agricultural purposes in favor of Don Jose Rufino Goenaga for six thousand sixty three pesos, 35 cents, inscribed at folio 66 over, number 118 of volume 19 of the old Registry. "C" A mortgage in favor of Don Guillermo Noble for sixteen thousand one hundred and eighty-six crowns (escudos) 26 hundredths, in favor of Don Pedro David, inscribed at folio 121, number 242 of the same book 20, and which according to a marginal note attached to the foregoing entry appears as cancelled, the same should be considered void, as it has not been shown that one Doña Juana Luisa Correa alleged to be the widow of Don Pedro David, had a right to cancel said obligation.

This mention of liens appears from the said first inscription of the property in question, and

Second. Notice of a complaint filed in the District Court of the United States for Porto Rico, by attorneys N. B. K. Pettingill and Robert H. Todd, in representation of the Succession of Don Guillermo Noble, composed of Josefa Ruiz de Noble, James R. Noble, William Sara Isabel Noble de McCormick, Arthur H. Noble,
28 Josefa B. Noble and Maria T. Noble, as plaintiffs against the succession of Don Ricardo Gallardo, composed of Elisa Gallardo Seary, Estefania Varroni, Celestina Gallardo Varroni and Eva Gallardo Varroni as defendants, there appearing as intervenors the Succession of Don Jose Rufino de Goenaga, composed of Francisco Goenaga Olsa, Ana Goenaga Olsa de Chabert, Francisco Goenaga Fuertes, Nicholas Garcia de Quevedo y Goenaga, Rufino Goenaga Fuertes, Felix Padial Goenaga, Maria Padial Goenaga de Solomon, Augusto Garcia de Quevedo Goenaga, Obdulia de Cottes Goenaga y Victoria Cottes y Goenaga de Ferrer, the said complaint being dated January 6th, 1808, in which suit the plaintiffs and the intervenors asked the Court to declare that there existed upon the said property a lien in favor of said plaintiffs and intervenors, for the sums of sixteen thousand one hundred and eighty six crowns and six thousand sixty three pesos 35 cents respectively, with interests, the first from December 22nd 1865, and the second from the 1st of December 1864; that in case the said credits with their interests should not be paid within a given term, the said property or

so much thereof as may be necessary, be sold in order to make said payments: that the defendants inherited said property subject to said lien, and that in case that said sale should be effected, all the rights, titles and interests of the said defendants shall stand excluded and cancelled, and that the title be transferred to the purchasers in said sale and that plaintiffs and the intervenors be granted all other equitable relief as may be proper; the said suit being pending on appeal before the Supreme Court of the United States, which notice of complaint appears at the margin of inscription first of the said property, number 48, folio 2, volume 2 of Loiza, there appearing no other lien inscribed in the Registry.

It so appears from the books of the Registry to which I refer.

In testimony whereof, I issue the present in San Juan Porto
29 Rico, on the 29th of November, 1912.

JOSE S. BELAVAL.

The above is a correct translation.

(Signed) F. FANO,

Interpreter & Translator U. S. Court.

30 In the District Court of the United States for Porto Rico.

Filed November 30, 1912.

Mr. Registrar of Property, Section 2:

Carlos Pesquera as verbal mandatary of Doña Estefania Veronne sets forth:

That my constituent desires to obtain a literal certified copy of entry number 11, at folio 7 of book 20 of the old "Anotaduria" of Mortgages.

Porto Rico, November 20, 1912.

CARLOS PESQUERA.

Presented together with two stamps of one dollar each.

San Juan Porto Rico November 21, 1912.

JOSE BENEDICTO.

C. PESQUERA.

31 Jose Benedicto y Geigel, Registrar of Property of San Juan, Porto Rico, Section 2.

I certify, in view of the foregoing petition:

That at Folio 7 of Book 20 of the old "Anotaduria" of mortgages, there appears an entry marked under number 11, which literally copied reads as follows:

Don Ramon Ruiz, resident of Loiza, by deed executed in the town of Naguabo, on the 22nd of December last past, before the public scrivener thereof Don Jose Celestino Schroder, acknowledged himself as debtor to Don Guillermo Noble of that neighborhood in the sum of sixteen thousand one hundred and eighty six crowns current money which he bound himself to pay with the

proceeds of the crops of the sugar plantation called "San Jose Cacique" situated in the district of Loiza, and as security therefor he pledged especially the products to be manufactured in said sugar mill from the present month and thereafter upon condition that he shall not sell, encumber or mortgage the same in favor of any other, otherwise the same shall be held void.

Porto Rico January 22nd, 1866.

(Signed) PEDRO R. ESCALONA.

The foregoing entry is a true copy of the original of its contents to which I refer; not including in this certificate other particulars because the property does not correspond to this section.

In testimony whereof, I issue the present which I sign and seal in San Juan, Porto Rico, at two o'clock of this afternoon on this 22nd day of November 1912.

JOSE BENEDICTO.

The above is a correct translation.
(Signed) F. FANO,
Interpreter & Translator U. S. Court.

32 (Verified Copy.)

Acquittance.

Number Two Hundred and Sixty Six.

In the city of San Juan de Puerto Rico, on the 10th of August 1883, before me, Don Demetrio Jimenez y Moreno, resident thereof, Notary Public of its District and Territorial College of this Island and before the witnesses hereinafter to be named, appear

Of one part: Don Juan Emilio Turull y Amadeo, and Don Jose Pacheco, married, over 40 years of age, property owners of this vicinity, as per personal certificates (cedulas) of the 6th class issued by the Local Authority under numbers 2109 and — respectively which they exhibit and I return to them.

And of the other: Don Ricardo Gallardo y Rivera, married, 47 years of age, sugar planter, neighbor of the town of Loiza, temporarily residing in this city, who also exhibits his personal certificate.

And they assuring me that they are in the full enjoyment of their civil rights, and with legal capacity, in my judgment, to execute the present deed of acquittance and cancellation of mortgage, of all of which, as well as to my knowledge of the parties, and other circumstances, I certify, they set forth:

First. That Mr. Gallardo is the owner in full dominion of the following property:

A Sugar Cane Plantation, called "San Jose de Cacique" situated in the ward of the town of Loiza, composed of eight hundred and thirty eight cuerdas, equivalent to three hundred and twenty nine hectares, thirty six ares, seventy five centiares, with two dwelling houses, one of first and second floor, built of masonry and wood,

zinc roofed, and another one of one story, of wood; plant
33 for the manufacture of sugar and rum, of masonry and wood, roofed with shingles and zinc; bounded all along its northern boundary by the hamlet of Las Cuevas and the Mediania farms belonging to several owners; on the South by lands of the said Mr. Gallardo, and those of Don Pablo Ubarri and Don Antonio Garcia Revolledo; on the East by lands of Cecilio Lopez and Don Pablo Ubarri, and on the West by the River Grande of Loiza and other lands of Mr. Gallardo.

Which property he has inscribed by virtue of a supplementary title in the Registry of Property, volume 44 of the Archive, second of Loiza, folio 2, property number 48, inscription first.

Second. That at the time of entering said inscription of possession, there were charged to the above described property several liens to which the same was subject, according to the books of the old "Anotaduria" of Mortgages, amongst which there is one for five thousand nine hundred and fifty nine pesos in favor of Don Juan Emilio Turull, inscribed at folio 82, book 18 which was increased up to sixteen thousand and eighty three crowns eight hundred and eighty thousandths, by entry number twenty two at folio 13 of book 20.

Third. That both credits were included in the claims of creditors against Don Ramon Ruiz Gandia, bankrupt, represented by his trustees, the parties hereto, Messrs. Pacheco and Turull; but Mr. Gallardo being the owner of the property subject to the liens thereon, he has been paying the same on different installments fixed by mutual agreement with the creditors, up to this day when he has paid up in full those recited in the preceding chapter.

Consequently, and in order that the entries aforementioned may be totally cancelled in the Registry of Property, and the said sugar plantation may remain free from those incumbrances, by these presents, they

Issue in favor of Don Ricardo Gallardo y Rivera, and of
34 those who may have a better right thereto, the most solemn acquittance for their best safeguard, for the total sum which said credit involves, thus declaring free from all liability the described property and wishing and yielding to the total cancellation of the entries made at folios 82 of book 18 and 13 number 22 of book 20, and at the same time binding themselves not to make any claim against Mr. Gallardo in the future, of any kind or character, for such concept.

Fourth. The parties hereto being aware of the contents of this deed solemnly accepted it.

And I the Notary advised the parties that a first copy of this deed must be presented for registration at the Registry of Property of this capital, without which requisite it shall not prejudice a third party neither shall it be admitted in evidence in any tribunal, Council or office.

They so stated, executed and signed before the witnesses Don Jose F. Adsuar, and Don Jaime de Goicoechea y Elfao, of this vic-nity, without legal disqualification to act as such; and having

read to them this deed, they having waived their right to do it themselves, the same is approved and ratified of which I give faith. Signed: Jose Pacheco.—J. Emilio Turull.—Jose F. Adsuar.—As witness at the request of Don R. Gallardo Jesus de Goicoechea.—Marked and signed: Demetrio Gimenez y Moreno.

It is a true and correct copy of its original filed in the protocol of the late notary of this capital Don Demetrio Jimenez y Moreno in the year 1883, now in my charge as general recorder of notarial protocols of this district. In testimony whereof and at the request of an interested party I issue the present on one sheet of paper of my use, affixing to it an internal revenue stamp of fifty cents, having taken note of this copy and marking and signing the same in San Juan, Porto Rico November 8th, 1912.

(Signed) HERMO. DIAZ,
Lawyer-Notary.

The above is a correct translation.
(S'g'd) F. FANO,
Interpreter & Translator, U. S. Court.

35 In the District Court of the United States for the District of Porto Rico.

(Filed Nov. 30, 1912.)

Equity. No. 524.

JOSEFA RUIZ DE NOBLE et al., Complainants,
vs.
ELISA GALLARDO Y SEARY et al., Respondents.

Answer.

Now come the respondents herein, by their attorney Miguel Guerra, and in answer to the complainants' bill of complaint, answer and allege:

I.

Respondents admit that during and prior to the year of our Lord 1865, one Ramon Ruiz Gandia, since deceased, was the owner of an undivided interest in the estate called "San José Cacique," and that the said Ruiz Gandia was at the same time in possession and control of the whole of said plantation or estate by virtue of a lease of the remaining interest therein from his co-owners, Doña Amalia Seary, Don Ricardo Gallardo and Don Jorge Seary; but respondents deny that the contract referred to in complainants' said bill of complaint, ever was and is a contract of refaccion, and they aver the fact to be that said contract was merely an acknowledgment of a liquidated indebtedness which said Ruiz Gandia owed then and there to complainants' ancestor, the said William Noble, whereby the said Gandia obligated to pay Noble the said indebted-

ness with the crops which might be ground at the said estate
36 from the year 1866 until the full payment of the indebtedness thereby acknowledged. Respondents further allege, in answer to the first paragraph of said bill of complaint, that the said Ruiz Gandia remained in possession, as aforesaid, of the said estate until he was adjudged to be in bankruptcy, by some court of competent jurisdiction of this Island, some time between the years 1866 and 1870.

II.

In answer to the second paragraph of said bill, respondents admit that on the 22nd day of December, 1865, the said Ramon Ruiz Gandia executed in favor of complainants' ancestor, William Noble, the deed which, marked "Exhibit A," is filed and attached as a part of said bill of complaint; but respondents deny that said deed and instrument, executed as aforesaid, was an acknowledgment of a mortgage lien upon the lands in question, but merely the recognition of a personal indebtedness which the said Ruiz Gandia thereby obligated to pay from the proceeds of the crop of 1866 and the following years until the complete and full payment thereof.

Respondents aver that the sum of $8,093.00 alluded to in said deed, was given to the said Ruiz Gandia by complainants' ancestor, not for the support and refaccion of said estate, but only for the payment of the lease of the same to the other co-owners.

Respondents further aver that the said Ruiz Gandia did not thereby create a lien upon his share or interest in the said estate, nor upon all of his property generally, for the contract aforesaid had no such effect, and because the law in force in Porto Rico at the time the said deed was executed expressly prohibited the execution or creation of general mortgages or liens. Said law was
37 Law 3rd, title 16, book 10 of the Novisima Recompilacion.

Respondents further aver that the said instrument, executed as aforesaid, did not create a mortgage upon the products of said estate; and allege the fact to be that under no law in existence in Porto Rico at the time of the execution of said deed, or ever since, can a mortgage be created upon personal property, for mortgages were and are only created upon real property or immovables.

III.

Respondents deny that, in accordance with the laws then and now in force in Porto Rico, the said indebtedness could ever be recorded as a lien upon the said estate "San José Cacique" in the then existing book of mortgages; they further deny that said indebtedness was ever recorded as a lien upon and against the land in question in the said book of mortgages, or in any other Registry; and respondents aver the fact to be that said indebtedness, and the deed whereby it was acknowledged, were recorded in the old "anotaduria" in book 20, folio 7, No. 11, literally as follows, to wit:

"Don Ramon Ruiz, a resident of Loiza, by deed executed in the town of Naguabo on the 22nd day of December last, before the public scribner of said town, Don José Celestino Schroder, constituted

himself a debtor of Don Guillermo Noble, of said town, in the sum of 16,196 escudos, current money, which sum he obligates himself to satisfy with the proceeds of the fruits of the sugar estate called "San José Cacique" situated in the municipality of Loiza, for the security of which he expressly affects the products which may be manufactured at said sugar estate from the current month
38 on, with the condition that the same may not be sold, encumbered or mortgaged, in favor of any other person, and, if so, the same to be null.

Puerto Rico, January 22nd, 1866. Signed—Pedro Rf. Escalona."

IV.

Respondents admit that said estate was a sugar factory, and bounded by and composed of the lands and houses alluded to and described in paragraph fourth of complainants' bill of complaint.

V.

Respondents admit that about the year 186- the said Ramon Ruiz Gandia was declared a bankrupt. But respondents deny that the above mentioned Ricardo Gallardo acquired title to the whole of said estate, subject to the lien of said William Noble; respondents further deny that the said Ricardo Gallardo was required, upon applying for the registry of his possessory title in the year 1882, or in any other year, or at all, to recognize the lien of said William Noble; and respondents further deny that the said Ricardo Gallardo ever recognized the validity and existence of said indebtedness, nor its lien upon said plantation, in the Registry of Property, Book 2 of Loiza, folio 2, estate No. 48, first inscription, nor in any other book of the said Registry.

Respondents further allege and aver the fact to be that the said indebtedness is mentioned in the list of liens upon the said property in the books of the modern registry; but that the said mention has, as will be hereinafter alleged, no other or further effect than
39 that which the old inscription in the "anotaduria" had.

VI.

Respondents aver, in answer to paragraph 6th of complainants' bill of complaint, that they have no information whatever as to whether or not the said Ruiz Gandia ever paid the said Noble the said sum, or any part thereof, or any interest thereon; respondents aver that although a diligent search has been made for the bankruptcy proceedings instituted against the said Ruiz Gandia, in the archives of the District Courts of San Juan and Humacao, the same have not been found, and therefore said respondents are not in a position to answer and allege whether Noble's indebtedness and claim against Ruiz Gandia was ever proved, allowed and paid by the trustees of the latter's estate.

Respondents deny that the said sum of money with its interest constitutes a mortgage lien upon the said estate.

Respondents admit that the said deed filed herein, marked "Exhibit A", was presented in the present Registry on the 9th day of April, A. D. 1906; but aver the fact to be that the Registrar of Property on said date denied the registration thereof as a mortgage upon the said estate, for the following reasons, which, literally copied, read:

"Taking into consideration that the existing inscription in the old registry, the transfer of which is asked for, only affects the products which are manufactured at the San José del Cacique hacienda, the same not constituting a lien upon the realty, and although said lien is mentioned as a mortgage, among the
40 other encumbrances upon the estate, said mencion cannot be given any greater force or effect than that which the old inscription gives it; taking into consideration the fact that the said property, inscribed in favor of Don Ricardo Gallardo, is not mortgaged * * *

I deny the transfer asked for * * *."

Respondents further allege that complainants herein have not availed themselves of the remedy the law gives them, of appealing to the Supreme Court of Porto Rico from the decision of the Registrar of Property of San Juan, partly above transcribed, and that the said decision of the said Registrar is final as to their pretended mortgage.

VII.

Respondents further deny that the said Ricardo Gallardo, in the year 1883, or at any other time, or at all, ever recognized the validity and existence of the said indebtedness as a lien upon the said estate, by virtue of any notarial deed, or at all.

Wherefore, respondents pray that they be hence dismissed with costs to complainants herein.

(Signed) MIGUEL GUERRA,
Attorney for Respondents.

41 In the District Court of the United States for Porto Rico.

(Journal Entry, Nov. 30, 1912.)

Order Denying Motion to Set Aside Order pro Confesso.

#524. Equity.

JOSEFA RUIZ DE NOBLE et al.
vs.
ELIZA GALLARDO Y SEARY et al.

The motion to reopen the above entitled cause is heard by the Court, and after being duly considered, same is denied according to law, and it is ordered that the decree pro confesso given herein, stand as entered in the records of this Court, to which action of the Court the defendants herein duly object and except.

42 In the District Court of the United States for Porto Rico.

(Filed Dec. 10, 1912.)

JAMES R. NOBLE et al.
vs.
ELISA GALLARDO et al.

To the Hon. Paul Charlton, Judge of the said Court:

Come now respondents herein by their attorney Miguel Guerra and states:

That by order of this Hon. Court entered herein on the 30th day of November, 1912, Francisco Goenaga and others were allowed to file as intervenors their petition, in the above entitled suit, affecting the same tract or real estate known by the name of San José de Cacique.

That, as petition states, the claim of said intervenors against said real estate is a lien of the same nature as that claimed by the complainants Noble in the above entitled suit.

That defendants herein were given twenty days from the date of the said order of the Court, to answer to the said petition of Francisco Goenaga and others.

That counsel for said complainants, James R. Noble, et al., has filed herein a draft of a final decree to be submitted to the consideration and signature of your Honor, as to the Noble lien, wherein stipulation is made that if defendants within the three months following the date of said decree should fail to pay the said Nobles the amount of the lien aforesaid, then the estate in question is to be sold at public auction in satisfaction of said indebtedness.

43 That said defendants will soon prepare their answer to the petition of said intervenors and join issue with them as to their pretended lien on said estate and that it would be more conducive to justice and equity that the drawing and approval of said final decree be left over until this Hon. Court passes upon the merits of said intervenors' claim, thus giving a final decree covering both of the Nobles' and the Goenagas' claims, and thus avoiding to said defendants the necessity of filing two different appeals from said different decrees.

For the reasons aforesaid, these defendants pray unto your Honor that the signing of the said decree be left in abeyance until the Goenaga claim is finally passed upon and decided by this Court.

(Signed) MIGUEL GUERRA,
Counsel for Defendants.

Notice, with copy, of the preceding motion is hereby acknowledged.

San Juan, P. R., Dec. 9, 1912.

(Signed) N. B. K. PETTINGILL,
Counsel for Complainants and Intervenors.

December 10, 1912.

After hearing the motion is denied.
(Signed) PAUL CHARLTON.

44 In the District Court of the United States for Porto Rico.

(Filed Dec. 10, 1912.)

No. 524, San Juan.

JAMES R. NOBLE et al.
vs.
ELIZA GALLARDO Y SEARY et al.

Final Decree.

This cause coming on this day for final hearing upon the application of counsel for the complainants for a decree herein according to the prayer of their bill of complaint, a decree pro confesso having been duly entered on the 11th day of July, 1912, for want of further pleading by defendants within the time limited therefor by the Court, and counsel for defendants having been given further opportunity notwithstanding said decree pro confesso to be heard as to the form of this decree and the Court being fully advised in the premises;

It is thereupon ordered, adjudged and decreed that the equity of this cause is with the complainants; that on the 22nd day of December, A. D. 1865, one Ramon Ruiz Gandia was indebted to William Noble, ancestor of complainants, in the sum of eight thousand and ninety-three dollars gold ($8,093) for which he gave said Noble a mortgage lien, in addition to the tacit mortgage fixed by the law then in force, upon a certain plantation called "San Jose Cacique", situated within this district and hereinafter more fully described, which he agreed to pay during the following year; that thereafter and before paying any portion of said indebtedness the said Ramon Ruiz Gandia became bankrupt; that thereafter one Ricardo Gallardo, the ancestor of the defendants herein, acquired said property from said bankrupt estate subject to various
45 liens and among them the above lien in favor of said William Noble; and that, upon applying for and obtaining the recording of his title to said property in the books of the New Registry of Property in the year 1882, said Gallardo recognized as valid and agreed to pay certain liens on said property and among them said mortgage lien of said William Noble.

It is further hereby ordered, adjudged and decreed that the complainants James R. Noble, William D. Noble, Sara Isabel Noble, Arthur H. Noble, Josefa B. Noble and Maria T. Noble are found to be the children and only heirs at law of said William Noble and the owners by inheritance from him of the said indebtedness and mortgage lien; and the defendants Eliza Gallardo y Seary, Estefania Varonni, Celestina Gallardo y Varonni and Eva Gallardo y Varonni are found to be the heirs of said Ricardo Gallardo, deceased.

and the owners of said described real property by descent from him; and that, by the recognition of the continued existence and validity of said mortgage indebtedness by said Ricardo Gallardo in the year 1882 as aforesaid and subsequently by notarial instrument in the year 1883, the running of the statute of limitations against said indebtedness was interrupted and, thirty years not having elapsed from the time of such recognition to the date of the beginning of this suit, the right of complainants to demand the foreclosure of their said lien upon said real estate is a valid and subsisting right; and that the amount due thereon is the said principal sum of eight thousand and ninety-three dollars with interest thereon at the legal rate of six per centum per annum from the first day of January, 1883, the date of acknowledgment by Gallardo, amounting to the sum of fourteen thousand five hundred and forty dollars ($14,540),
46 making a total of twenty-two thousand six hundred and thirty-three dollars ($22,633).

It is therefore hereby further ordered, adjudged and decreed that, unless the said defendants pay or cause to be paid to the complainants within three months from this date the said sum of thirty thousand three hundred and forty-eight dollars, so found to be due as aforesaid, and in default thereof, the said mortgaged premises, described as follows, to wit: the plantation called "San Jose Cacique" consisting of eight hundred and thirty-eight cuerdas of land, lying within the barrio of the town of Loiza, having thereon two dwelling houses and various buildings composing a sugar factory, at that time bounded as follows: on the north, by the settlement called Las Cuevas and the farms of the Mediania belonging to various owners; on the south, by lands of Ricardo Gallardo, of Pablo Ubarri and of Antonio Garcia Revolledo; on the east, by lands of Cecilo Lopez and of said Pablo Ubarri; and on the west by the Rio Grande de Loiza and other lands of the same Gallardo; or so much thereof as may be necessary and sufficient to realize the amount due complainants as aforesaid for principal and interest, be sold at public auction by the Special Master in Chancery of this Court to the highest and best bidder for cash to satisfy the amount decreed to be a lien thereon as aforesaid.

It is hereby further ordered, adjudged and decreed that John L. Haas be, and he is hereby, appointed Special Master in Chancery of this Court to execute this decree by making said sale; that he give public notice of the time and place of such sale by previously publishing the same once each week for four consecutive weeks in a newspaper regularly published and having a general circulation in this District; that said sale be made at the door of the Court House of this Court in the city of San Juan aforesaid; and that said Special Master do make a report to this Court of his doings in the premises with all convenient speed, in case said indebtedness is not sooner satisfied and such sale rendered unnecessary.

It is hereby further ordered, adjudged and decreed that
47 the parties to this cause, or any of them, may become purchasers at said sale; and that, upon said sale being made and confirmed, the said defendants Eliza Gallardo y Seary, Estefania

Varonni, Celestina Gallardo y Varonni and Eva Gallardo y Varonni and all persons claiming by, through or under them, or either of them, since the commencement of this suit be forever barred and foreclosed of all right and equity of redemption in or to said mortgaged premises, or any part thereof; and that, in case the proceeds arising from said sale shall be insufficient to pay the amount so due the complainants as aforesaid, after deducting the costs of making said sale, which are to be first paid, the said Special Master shall in his report specify the amount of such deficiency; and, upon the confirmation of such sale, the complainants may upon application have such further decree in the premises as may be equitable.

And all other matters pending in this cause are hereby reserved until further order herein.

Done and ordered in open Court at San Juan, this 10th day of December, A. D. 1912.

(S'g'd) PAUL CHARLTON, *Judge.*

48 In the District Court of the United States for Porto Rico.

(Filed December 11, 1912.)

No. 524. Equity.

JAMES R. NOBLE et al.
vs.
ELISA GALLARDO Y SEARY et al.

Petition of Appeal.

The defendants Elisa Gallardo y Seary, Estefania Varonne, Celestina Gallardo y Varonne and Eva Gallardo y Varonne conceiving themselves aggrieved by the order of this Court made and entered in this cause on the 20th day of June, 1912, whereby the demurrer and the plea entered by said defendants in opposition to complainant's bill, were overruled; conceiving themselves also aggrieved by the order of this Court made and entered in this cause on the 30th day of November, 1912, whereby the application of said defendants to set aside the order pro confesso entered herein, was denied; and conceiving themselves aggrieved by the final decree heretofore made and entered by this Court in this cause, on the 10th day of December, 1912, whereby it was ordered, adjudged and decreed that the equity of said cause was and is with the complainants and against the defendants; and whereby it was further ordered, adjudged and decreed that on the 22nd day of December, A. D. 1865, one Ramon Ruiz Gandia was indebted to William Noble, ancestor of complainants, in the sum of $8,093 gold, for which he gave said Noble a mortgage lien, in addition to the tacit mortgage fixed by the law then in force, upon the plantation which is fully described in complainants' said bill of complaint, which said Ruiz Gandia
49 agreed to pay during the following year; that thereafter and before paying any portion of said indebtedness the said

Ramon Ruiz Gandia became bankrupt; that thereafter one Ricardo Gallardo, ancestor of said defendants, acquired said property from said bankrupt estate subject to the said lien of said William Noble and that, upon applying for and obtaining the recording of his title to said property in the books of the New Registry of Property in the year 1882, said Gallardo recognized as valid the said mortgage lien of said William Noble; and whereby it was further ordered, adjudged and decreed that by the recognition of the continued existence and validity of said indebtedness by said Ricardo Gallardo in the year 1882 and subsequently by Notarial instrument in the year 1883, the running of the statute of limitations against said indebtedness was interrupted and, thirty years not having elapsed from the time of such recognitions to the date of the beginning of this suit, the right of complainants to demand the foreclosure of their said lien upon said real estate is a valid and subsisting right; and that the amount due thereon is the said principal sum of $8,093 dollars with interest thereon at the legal rate of six per cent per annum from the first day of January, 1883, the date of acknowledgment by Gallardo, amounting to the sum of $14,540 making a total of twenty-two thousand six hundred and thirty three ($22,633) dollars; and whereby it was further ordered, adjudged and decreed that said real estate be sold at public auction by the special Master of this Court to the highest and best bidder to satisfy the amount decreed to be a lien thereon as aforesaid; and whereby it was further ordered, adjudged and decreed that said defendants, upon said sale being made and confirmed, be forever barred and foreclosed of all right and equity of redemption in or to said
50 mortgaged premises, or any part thereof; and, finally, said defendants, conceiving themselves also aggrieved by the order of this Court made and entered in this cause on the 10th day of December, 1912, whereby the motion of said defendants petitioning that the signing of said final Decree be left over and postponed until the Court could pass upon the petition in intervention of Francisco Goenaga et al. now pending in this cause, so that a sole and only decree may be given, covering each and all of the matters and issues involved in this cause, thus avoiding a multiplicity of appeals; do hereby appeal from said orders and final decree to the Supreme Court of the United States for the reasons specified in the assignment of errors to be filed herein, and they pray that this their petition of appeal may be allowed and may operate as a supersedeas upon the giving of a bond in the sum to be fixed by the Court, and that a transcript of the record, proceedings and papers upon which said orders and decree were made, duly authenticated, may be sent to said Supreme Court of the United States.

Dated this 11th day of December, 1912.

(S'g'd) MIGUEL GUERRA,
Solicitor for said Defendants.

51 In the District Court of the United States for Porto Rico.

(Filed February 27, 1913.)

No. 524. Equity.

JAMES R. NOBLE et al.
vs.
ELISA GALLARDO Y SEARY et al.

Assignment of Errors.

Now come defendants and appellants in the above entitled cause, and assign the following as errors committed by the Court aforesaid in the course of the proceedings in said cause in this Court:

1.

The Court erred in overruling the demurrer interposed by defendants to the bill of complaint filed by complainants in said cause.

2.

The Court erred in holding and deciding that complainants did not and have not a plain, adequate and complete remedy at law for the cause of action set forth in the bill of complaint.

3.

The Court erred in holding and deciding that plaintiffs were and are entitled to the relief prayed by said bill against said defendants.

4.

The Court erred in holding and deciding that complainants' bill is not without equity.

5.

52 The Court erred in holding and deciding that it had and has jurisdiction over and concerning the matters set forth in the bill of complaint herein, and to try, decide and determine the same.

6.

The Court erred in holding and deciding that equity had and has jurisdiction over and concerning the matters set forth in the bill of complaint herein, and to try, decide and determine said matters.

7.

The Court erred in assuming and taking jurisdiction over and concerning the matters with said cause and entering a final decree therein.

8.

The Court erred in holding and deciding that the cause of action herein is not barred and extinct by law and specially by Art. — of the Mortgage Law of May, 1880 and by Art. 134 of the Mortgage Law of May 26th, 1893, and Articles 1864, 1865, and clause 3 of Art. 1867 and 1840 of the Civil Code now in force in Porto Rico, and by Arts. 1963, 1864, clause 3 of 1966 and 1939 of the Civil Code of Porto Rico of 1889.

9.

That the Court erred in holding and deciding that complainants' cause of action is not barred because the same accrued more than thirty, twenty, fifteen and five years respectively prior to the time of the filing of this suit.

10.

The Court erred in overruling the plea interposed by defendants to the bill of complaint filed by complainants in said cause.

53

11.

The Court erred in denying the motion of said defendants to set aside the order pro confesso entered herein by complainants on the 11th day of July, 1912.

12.

The Court erred in holding that defendants had not been and were not diligent in filing their answer to the said bill of complaint and in holding that defendants' defense was and is not a meritorious one.

13.

The Court erred in denying defendants' motion to postpone and leave in abeyance the making and entering of the final decree herein until the matter of the Goenaga lien might be passed upon by the Court.

14.

The Court erred in holding that the lien which Ramon Ruiz Gandia gave to complainants' ancestor, William Noble, on the 22nd day of December, 1865, for the sum of 16,186 escudos was a mortgage upon the estate San Jose de Cacique referred to in complainants' bill of complaint.

Wherefore, the defendants respectfully pray that the final order and decree made in this case be reversed and set aside, and that an order be made by the Supreme Court of the United States dismissing the proceedings in this cause, or making any other disposition of the case in accordance with equity.

(S'g'd) MARTIN TRAVIESO, JR.,
Solicitor for Defendants-Appellants.

San Juan, February 27th, 1913.

54 In the District Court of the United States for Porto Rico.

(Filed Dec. 11, 1912.)

No. 524. Equity.

JAMES R. NOBLE et al.
vs.
ELISA GALLARDO Y SEARY et al.

Order Allowing Appeal, etc.

The defendant Elisa Gallardo y Seary, Estefanía Varonne, Celestina Gallardo y Varonne and Eva Gallardo y Varonne, by their counsel having on the 11th day of December, 1912, filed their Petition of Appeal in this case, it is hereby ordered: that an appeal to the Supreme Court of the United States from the final decree entered herein on the 10th day of December, 1912, be, and the same hereby is, allowed to said defendants; and that a certified transcript of the record and all proceedings herein upon which said orders and decree were made be transmitted to said Supreme Court of the United States, but that time for filing such transcript shall be enlarged until the 10th day of March, 1913.

It is further ordered: that the bond on appeal be fixed at the sum of six thousand ($6,000) dollars, the same to act as a supersedeas bond and also as a bond for cost and damages on appeal, and that said bond may be filed within sixty days from the date of the final decree herein, and may be approved by the Clerk of this Court.

Dated at San Juan, P. R. December 11th, 1912.

[SEAL.] (Signed) PAUL CHARLTON, *Judge.*

55 UNITED STATES OF AMERICA, *ss:*

To James R. Noble, William D. Noble, Sara Isabel Noble de McCormack, Arthur H. Noble, Josefa B. Noble and Maria T. Noble or their attorney of record, N. B. K. Pettingill, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the District Court of the United States for the District of Porto Rico, wherein Elisa Gallardo y Seary, Estefania Varonne, Celestina Gallardo Varonne and Eva Gallardo y Varonne are plaintiff- in error and you are defendant- in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Paul Charlton, Judge of the District Court

of the United States for Porto Rico, this eleventh day of December, in the year of our Lord one thousand nine hundred and twelve.

[Seal United States District Court for the District of Porto Rico.]

PAUL CHARLTON,
Judge of the District Court of the United States for Porto Rico.

[Endorsed:] 524. Equity. James R. Noble et al. vs. Eliza Gallardo et al. Citation. Filed Clerk's Office, United States District Court, December 11, 1912. Rafael Guillermety, Clerk of the Court, by Susanna Aldao.

On this eleventh day of December, in the year of our Lord one thousand nine hundred and twelve, the subscriber N. B. K. Pettingill, counsel of record for appellees, does hereby acknowledge service and delivery of a true copy of the within citation.

N. B. K PETTINGILL,
Counsel for James R. Noble et al., Appellees.

56 ***Bond.***

(Filed Feb. 10, 1913.)

Know All Men By These Presents, That we, Elisa Gallardo, Celeste Gallardo, Estefania Veronne Vda. Gallardo and Eva Gallardo, as principals, and Gabriel Guerra & Clemente Fernandez as sureties, are held and firmly bound unto James R. Noble, William D. Noble, Sara Isabel Noble de McCormick, Arthur H. Noble, Josefa B. Noble and Maria F. Noble, in the full and just sum of Six thousand ($6,000.00) dollars, to be paid to the said James R. Noble, William D. Noble, Sara Isabel Noble de McCormick, Arthur H. Noble, Josefa B. Noble and Maria F. Noble certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this tenth day of February, in the year of our Lord one thousand nine hundred and thirteen.

Whereas, lately at a session of the District Court of the United States for Porto Rico, in a suit depending in said Court, between Elisa Gallardo, Celeste Gallardo, Estefania Veronne Vda. Gallardo and Eva Gallardo, Defendants and James R. Noble, William D. Noble, Sara Isabel Noble de McCormick, Arthur H. Noble, Josefa B. Noble and Maria F. Noble.

A final decree was rendered against the said Elisa Gallardo, Celeste Gallardo, Estefania Veronne Vda. Gallardo, and Eva Gallardo,
57 and the said James R. Noble, William D. Noble, Sara Isabel Noble de McCormick, Arthur A. Noble, Josefa B. Noble and Maria F. Noble having obtained a citation and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree

in the aforesaid suit, and a citation directed to the said James R. Noble, William D. Noble, Sara Isabel Noble de McCormick, Arthur H. Noble, Josefa B. Noble and Maria F. Noble citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date thereof.

Now, the condition of the above obligation is such, That if the said Elisa Gallardo, Celeste Gallardo, Estefania Veronne Vda. Gallardo, and Eva Gallardo shall prosecute said appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of:

(Signed) ELISA GALLARDO.
" CELESTE GALLARDO. [SEAL.]
" ESTEFANIA VDA. GALLARDO. [SEAL.]
" C. FERNANDEZ. [SEAL.]
" GABRIEL GUERRA. [SEAL.]
" EVA GALLARDO.

(Signed) MIGUEL GUERRA.
" MIGUEL GUERRA.
" MIGUEL GUERRA.
" MIGUEL GUERRA.
" MIGUEL GUERRA.
" MIGUEL GUERRA.

Approved by
(Signed) RAFAEL GUILLERMETY,
Clerk Dist. Court U. S. for P. R.

[SEAL.]

58 In the District Court of the United States for Porto Rico.

(Journal Entry, June 15, 1912.)

#524. Equity.

JOSEFA RUIZ DE NOBLE et al.
vs.
ELIZA GALLARDO Y SEARY et al.

The hearing of the Plea filed by the Defendants in the above entitled cause, is set for Thursday, June 20th, 1912, at 10 o'clock A. M.

(Journal Entry, June 20, 1913.)

#524. Equity.

JOSEFA RUIZ DE NOBLE et al.
vs.
ELIZA GALLARDO Y SEARY et al.

The demurrer and the plea filed by the defendants in the above entitled cause, are heard by the Court and after being duly con-

sidered, same are overruled, and said defendants have leave to renew same or to answer until Wednesday, July 10th, 1912, to which action of the Court, defendants duly object and except.

59 In the District Court of the United States for Porto Rico.

#524. Equity.

JOSEFA RUIZ DE NOBLE et al.
vs.
ELIZA GALLARDO Y SEARY et al.

(Journal Entry, November 7, 1912.)

The hearing of the motion to set aside the order pro confesso entered herein is set for Friday, November 8, 1912, at 10 o'clock A. M.

#524. Equity.

JOSEFA RUIZ DE NOBLE et al.
vs.
ELIZA GALLARDO Y SEARY et al.

(Journal Entry, November 9, 1912.)

The motion to set aside the order pro confesso entered herein, is duly heard by the Court and same is held in abeyance until Saturday, November 23, 1912, at 10 o'clock A. M.

#524. Equity.

JOSEFA RUIZ DE NOBLE et al.
vs.
ELIZA GALLARDO Y SEARY et al.

(Journal Entry, Nov. 27, 1912.)

All matters pending in the above entitled cause are set for Friday, November 29, 1912, at 10 o'clock A. M.

60 In the District Court of the United States for Porto Rico.

#524. Equity.

JOSEFA RUIZ DE NOBLE et al.
vs.
ELIZA GALLARDO Y SEARY et al.

(Journal Entry, November 30, 1912.)

The petition for intervention herein is heard by the Court, and after being duly argued, opposition thereto is withdrawn by counsel

for the defendants, and same is granted according to law, and the defendants are given twenty days to answer to the bill of complaint filed herein.

#524. Equity.

JOSEFA RUIZ DE NOBLE et al.
vs.
ELIZA GALLARDO Y SEARY et al.

(Journal Entry, December 3, 1912.)

The hearing of all matters pending in the above entitled cause are set for Saturday, December 7, 1912, at 10 o'clock A. M.

61 In the District Court of the United States for Porto Rico.

#524. Equity.

JOSEFA RUIZ DE NOBLE et al.
vs.
ELISA GALLARDO Y SEARY et al.

(Journal Entry, December 11, 1912.)

Now on this day come the defendants herein, by their Attorney Miguel Guerra, and presents to the Court a petition of appeal in the above entitled cause, which same is ordered to be filed of record.

#524. Equity.

JOSEFA RUIZ DE NOBLE et al.
vs.
ELIZA GALLARDO et al.

(Journal Entry, December 11, 1912.)

Now on this day comes Miguel Guerra, Esq., attorney for the defendants herein and moves the Court to fix the amount of the appeal herein, which said motion after being duly heard and considered by the Court, it is ordered that a bond be furnished by the said defendants for the amount of six thousand dollars ($6,000), and that an order be prepared by said attorney investing the Clerk of this Court with sufficient authority to approve the bond herein mentioned in the absence of the Judge of this Court.

62 524. Equity.

JOSEFA RUIZ DE NOBLE et al.
vs.
ELIZA GALLARDO Y SEARY et al.

Journal Entry, Feb. 10, 1913.

Now on this day come Elisa Gallardo, Celeste Gallardo, Estafania Verone Vda. Gallardo and Eva Gallardo, represented by their attorney, Miguel Guerra, Esq., and present a bond for the amount of six thousand dollars ($6,000.00), which said bond after being duly examined by me, as clerk of this court, and with sufficient authority for the approval of same, as per order of this court given on the 11th day of December, 1912, the same is hereby approved on this 10th day of February, 1913.

63 In the District Court of the United States for Porto Rico.

Filed February 27, 1913.

No. 524. Equity.

JAMES R. NOBLE et al., Complainants,
vs.
ELIZA GALLARDO Y SEARY et al., Defendants.

Præcipe for Transcript.

To the clerk of the above court:

You will please prepare a transcript of the record in the above cause, to be filed in the office of the Clerk of the Supreme Court of the United States, in the appeal taken by the above-named defendants, and include in the said transcript of record the following pleadings, proceedings and papers on file, to wit:

Bill of complaint.
Exhibit "A" for complainants.
Demurrer and plea to the bill of complaint, filed June 14th, 1912.
Order overruling demurrer and plea and granting leave to plead.
Order pro-confesso entered July 11th, 1912.
Motion to set aside order pro confesso.
Affidavit of merits.
Three documents filed in support of motion to set aside order pro-confesso.
Answer filed November 30, 1912.
Order denying motion to set aside order pro-confesso.
Motion postponing signing decree and order denying same.
Final decree.
Petition for appeal.
Assignment of errors.

Order allowing appeal.
Citation and return.
Supersedeas bond on appeal.
All journal entries made after June 14th, 1912.
Præcipe for transcript.

Said transcript to be prepared as required by law and by the rules of the Supreme Court of the United States, for the purposes aforesaid.

Very respectfully,
(Signed) MARTIN TRAVIESO, JR.,
Solicitor for the Defendants.

64 In the District Court of the United States for Porto Rico.

#524. Equity.

JOSEFA RUIZ DE NOBLE et al.
vs.
ELIZA GALLARDO Y SEARY et al.

I, Rafael Guillermety, Clerk of the District Court of the United States for Porto Rico, do hereby certify that the foregoing typewritten pages numbered 1 to 63, inclusive, to be a true and correct copy of certain proceedings in the above entitled cause, as called for by the præcipe filed by the Counsel for the appellant, copy of which præcipe is hereto attached.

In Testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 28th day of February, A. D. 1913.

[Seal United States District Court for the District of Porto Rico.]

RAFAEL GUILLERMETY, *Clerk.*

65 [Endorsed:] No. 524. Equity. In the District Court of the United States for Porto Rico. Josefa Ruiz de Noble et al. vs. Eliza Gallardo y Seary et al. Transcript of Record.

Endorsed on cover: File No. 23,617. Porto Rico D. C. U. S. Term No. 141. Elisa Gallardo y Seary, Estefania Varonne, Celestina Gallardo y Varonne, and Eva Gallardo y Varonne, appellants, vs. James R. Noble, William D. Noble et al. Filed April 5th, 1913. File No. 23,617.

Office Supreme Court, U. S.
FILED
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JAMES D. MAHER

Supreme Court of the United States,

OCTOBER TERM, 1914.

No. 141.

ELISA GALLARDO Y SEARY, *et al.*,
Appellants,

vs.

JAMES R. NOBLE, *et al.*

BRIEF FOR APPELLANTS.

FREDERIC R. COUDERT
HOWARD THAYER KINGSBURY,
Counsel for Appellants,
2 Rector Street,
New York City.

B. H. TYRREL, PRINTER, 206-8 FULTON STREET, NEW YORK.

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Supreme Court of the United States,

OCTOBER TERM, 1914.

No. 141.

ELISA GALLARDO Y SEARY *et al.*,
Appellants,

vs.

JAMES R. NOBLE, *et al.*

BRIEF FOR APPELLANTS.

Statement.

This is an appeal by the defendants from a final decree of foreclosure and sale rendered by the District Court of the United States for the District of Porto Rico on December 10th, 1912.

The Bill of Complaint was filed on January 9th, 1908. It alleged that on *December 22nd, 1865,* one Ramon Ruiz Gandia, being the owner of an *undivided interest,* (the extent of which was not stated), in a certain sugar plantation called "San Jose Cacique," and being the *lessee* of the remaining interests therein from his co-owners, gave a mortgage, described in the Bill as a "con-

tract of refaccion", to one William Noble (complainants' ancestor) in the sum of 16,186 *escudos* ($8,093) covering the *future crops* of the plantation (Rec. p. 1).

A copy of the instrument is annexed to the Bill of Complaint. It recites and acknowledges an indebtedness of 16,186 escudos, for money supplied since 1863 "for *the payment of the lease* on the "San Jose Cacique Estate", and the debtor "binds himself to pay the above mentioned sum to his creditor Noble, *with the proceeds of the first crops* which may be ground from next January thereafter at the said San Jose Cacique Plantation". As security, "besides the general obligation which he hereby makes of all his property", he "*mortgages expressly and especially not only the canes which may be ground in the next crop by the 'Cacique' Plantation, * * * * * but also those which it may grind in the following crops* until the complete payment of the amount herein acknowledged" (Rec. pp. 4, 5).

It is this mortgage for $8,093, due nearly fifty years ago, given by a *part* owner and *lessee*, and expressly covering only future crops, which the judgment below directs to be foreclosed as a lien for $22,633 upon the *whole plantation*.

The Bill of Complaint further alleges that Ramon Ruiz Gandia became bankrupt, and that one of his co-owners, Ricardo Gallardo, the ancestor of the appellants, acquired title to the plantation, and in 1882 and 1883 recognized in writing the indebtedness and the lien of the mortgage (Rec. pp. 2, 3). It does not appear how Gallardo acquired the interests of the two remaining co-owners, Doña Amalia Seary and Don Jorge Seary.

The defendants interposed a plea of laches and

of the statute of limitations. The defence of laches was sustained, without passing on the question of limitation (reported as Succ'n of De Goenaga *vs.* Succ'n of Gallardo, 5 Porto Rico Fed. Rep. 10). The complainants appealed to this Court, which held that the equitable doctrine of laches, as developed by the English and American Courts of Chancery, should not be applied to the case under consideration, but that it should be determined by the Spanish law in force when the transactions took place. All questions as to the scope and effect of the mortgage and as to the Spanish law relating to prescription against mortgages and to subsequent recognitions, were expressly reserved. The decree was "reversed without prejudice", and the case "remitted to the District Court for further consideration" (Noble *vs.* Gallardo, 223 U. S. 65-67). Upon such former appeal there was no appearance or brief for the then appellees, who are the appellants in the case now at bar.

The defendants then (June 14, 1912) interposed a demurrer for lack of equity, coupled with a plea of the five, fifteen, twenty and thirty year periods of limitation (Rec. p. 6). Issue was tendered by the plea, but was not joined, and on June 15, 1912, the hearing of the plea was set for June 20, 1912 (Rec. p. 32). On that day the demurrer and plea were heard by Judge Charlton, and overruled without opinion, and defendants were granted "leave to renew same or to answer until Wednesday, July 10, 1912" (Rec., p. 7).

On or about July 8, 1912, defendants' counsel applied informally to Judge Charlton for an extension of time (Rec. p. 10). No action was then taken, but on July 11, 1912, an order was entered

taking the Bill of Complaint *pro confesso* (Rec. p. 8). Thereafter, an application was made by defendants to set aside this order, and for leave to file an answer and renew the demurrer and plea (Rec. p. 9). An affidavit of merits and a proposed answer were submitted (Rec. pp. 9-22). These papers are important here as giving officially authenticated copies of the instruments claimed to constitute the recognitions of the mortgage. This application was denied on November 30, 1912 (Rec. p. 22). The defendants then applied to suspend the entry of the decree until the determination of the Goenaga intervention, which presented a similar question (Rec. p. 23).

This intervention was subsequently decided by Judge Hamilton against the intervenors. A copy of his able opinion is printed as an Appendix to this Brief (*post* pp. 23-31).

On December 10, 1912, a final decree was entered fixing the amount due upon the mortgage at $8,093 (gold), with interest at 6% from January 1st, 1883, amounting to $14,540, making a total of $22,633, and directing a sale of the plantation unless the sum of **$30,348** should be paid in three months (Rec., pp. 24, 25). This last sum is approximately, but not exactly, the total of the aggregate of principal and interest, with the principal added in once more. It is impossible to find any basis for it in the Record.

From such final decree the present appeal was taken, the sale being stayed by a *supersedeas* bond (Rec. pp. 30, 31).

Jurisdiction of this Court.

The amount in controversy is sufficient to confer jurisdiction upon this Court under the provis-

ions of §244 of the Judicial Code. The decree finds the amount of the mortgage to be $8,093 gold, and the amount due to be $22,633.

A decree of foreclosure and sale is final for purposes of review.

See

Ray *vs.* Law, 3 Cranch, 179;
Whiting *vs.* Bank of the United States, 13 Peters, 6, 15;
Bronson *vs.* Railroad Co., 2 Black (67 U. S.), 524, 531.

Specification of Errors.

The errors assigned in the Court below (Rec., pp. 28, 29), and to be urged in this Court, may be summarized as follows:—

1. The Court erred in overruling the demurrer and in holding that the lien given by Ramon Ruiz Gandia to William Noble was a mortgage upon the San Jose Cacique plantation as a whole.

2. The Court erred in not sustaining the plea of the several statutes of limitation.

3. The Court erred in granting a decree of foreclosure and sale.

4. The Court erred in refusing to reopen the case and permit the defendants to answer, and in refusing to suspend the entry of the decree until the determination of the Goenaga intervention.

Brief of the Argument.

I.—The instrument in suit created merely a lien on the future crops of the San Jose Cacique Plan-

tation, and could not in any event bind the title of the co-owners of the property.

II.—The instrument in suit is not a *"refaccion"* contract, and gave no tacit or general lien on Gandia's property.

III.—The complainant's claim is barred by limitation or prescription and has not been kept alive by subsequent recognition.

IV.—The complainants were not entitled to the remedy of foreclosure and the action of the Court below in refusing to re-open the case was an abuse of discretion.

POINTS.

I.

The instrument in suit created merely a lien on future crops, and could not bind the title of the co-owners of the property.

The complaint alleges that the mortgagor was the owner of *an undivided interest* in the plantation, and was in possession and control of the whole, "by virtue of a lease of the remaining interest therein from his co-owners" (Rec. p. 1), three in number. It does not appear what his or their respective interests were. He naturally did not attempt to mortgage *their* interests, nor did he even

undertake to create any lien on his own undivided interest in the land; he merely agreed to repay the loan out of the proceeds of the next crop (which he, as lessee, would gather), and of the following crops, so far as might be necessary. This Court, on the former appeal, when the present appellants were unrepresented, pointed out that the Court below had "expressed doubts whether any of the instruments bound the land" (223 U. S. at p. 66), but did not examine or pass upon the question, saying that on the further hearing in the Court below the case should "be scrutinized with care, * * * with reference to the property covered by the lien" (do. p. 67). It is so obvious, upon the instrument itself, and upon the allegations of the Bill, that Gandia did not attempt to mortgage anything but the crops, and had nothing to mortgage but an undivided interest, that the case ought to have been decided and the bill dismissed upon this ground. Judge Rodey evidently saw the point, but apparently thought the defence of laches furnished a more convenient ground on which to dispose of both the main suit and the intervention at the same time; Judge Charlton must have either overlooked it or ignored it altogether; otherwise the decision is inexplicable.

For the convenience of the Court, we here give the instrument in full, indicating by italics the portions material to this discussion.

Mortgage Obligation.

In the Town of Naguabo, Province of Porto Rico, on the 22d day of December, 1865, before me, the undersigned public scrivener of this district and before the witnesses to be

mentioned, there appeared Don Ramon Ruiz, a resident of Loiza, of whose acquaintance I hereby certify, and stated: that by a liquidation made on this date between himself and Mr. William Noble, a property owner of this district, it showed that the *former owed the latter the sum of Sixteen Thousand one Hundred and Eighty-six Escudos (8093 pesos) which he has been supplying him up to this date since the year 1863 to the present inclusive for the payment of the lease on the "San Jose Cacique" Estate*, situated in the aforesaid town of Loiza, and by reason of not being able to grind the crop of this last year, for causes not unknown to Mr. Noble, he has not been able to pay off said account; therefore, and wishing to carry into effect this agreement in the way and form more suitable in law, he states: that he acknowledges and confesses to be real-y and effectively the debtor of the above mentioned Mr. William Noble, in the above mentioned sum, for the reasons given. And in as much as the delivery of the money is not made in my presence for the aforesaid reasons, the receipt thereof being true, he hereby renounces the exception of money not counted, of the new law, title one, fifth partida, which refers to same, and the two years granted by the same law to present said exception, which he hereby grants as if they had ellapsed. *He therefore binds himself to pay the above mentioned sum to his creditor Noble, with the proceeds of the first crops which may be ground from next January thereafter* at the said San Jose Cacique Plantation; and there resulting from the liquidation made by the appearing party hereto, Ruiz, with Mr. Jose Rufino Goenaga in November last, that the former was indebted to said gentleman in the sum of two thousand Escudos (1,000 pesos), this must be paid during the month of October of next year 1866,

thereby being cancelled that deed of refaccion, and Ruiz obliged not to execute any other agreement or deed with damage to this present one wherein there will be annulled and without effect whatever that which he may execute in the future; this without prejudice of deducing also the ordinary and indispensable expenses for the maintenance, and development required by the said Plantation by reason of the necessary refaccion and other expenses. *For the better security of the aforesaid,* besides the general obligation which he hereby makes of all his property hindering the special obligation, neither the special hindering the general, *the appearing party hereto mortgages expressly and especially not only the canes which may be ground in the next crop by the "Cacique" Plantation,* situated in the jurisdiction of Loiza as aforesaid, but *also those which it may grind in the following crops until the complete payment of the amount herein acknowledged;* allowing that the opportune annotation be taken of this instrument by the Register of Mortgages of this district, within the legal time of thirty days, of which obligation and its effects, I the Scriverner notified the parties hereto.

To the fullfilment of all that has been set forth in the present deed, the appearing party hereto affects his present and future property, with the clause which allows the courts to have same executed, executory contract, submission and renouncing all laws and rights in his favor, as well as that which prohibits the general law as to form.

It was thus stated by him and he signed same, being present witnesses and residents herein Don Roque Diaz, Don Joaquin Porrata and Don Ramon Muñoz, of all of which I hereby certify. Signed Rn. Ruiz Gandia—Scrol-

led: Jose Celestino Schroder. Public Scriverner.

(Rec. pp. 4, 5).

No subsequent recognition of this lien, which at most could attach only to an undivided interest, could possibly extend it to cover the whole title. It is not even so alleged in the Bill, which merely states that "the validity and existence of said indebtedness and its lien upon said plantation was so recognized by said Gallardo, as appears duly noted in said Registry in Book 2 of Loiza, folio 2, Estate No. 48, first inscription" (Rec. p. 2). The inscription referred to is not quoted nor are any further details of it given. Now a lien upon an undivided interest in a piece of property is, in a certain sense, a lien on the property, but it does not bind the *whole property*, so as to subject the whole to sale to satisfy the lien. If authority for so elementary a proposition be desired, it may be found in Shirras *vs.* Caig, 7 Cranch, 34, 48, per Marshall, C. J.

At the very most, the alleged "recognition", the language of which is not given by complainants, would only imply that Gallardo took the property subject to a lien upon the undivided interest therein formerly of Ramon Ruiz Gandia. It is not alleged, and nowhere appears, what was the extent of this undivided interest. The Bill of Complaint, though taken *pro confesso*, thus affords no basis for a decree of foreclosure and sale, either of the plantation as a whole, or of any definite interest therein. Moreover, by the Mortgage Law of 1869 only specifically described real property can be mortgaged, and crops cannot be mortgaged apart from

the land which produces them (Arts. 106, 108; Alcubilla, Diccionario de la Administracion Español, 5th Ed. Vol. 6, p. 88; now Porto Rico Rev. Stat. of 1911, §§ 6790, 6792). The earlier law, while less explicit on this point, proceeds upon the assumption that mortgages can be made only of specific real property (*bienes raices*). See Novisima Recopilacion, Lib. X., Tit. XVI, Ley 3, subd. 4.

By this test, the instrument in suit is not a mortgage at all.

In any event, since the instrument never affected, or purported to affect, the title to the plantation, or anything except future crops, the decree should be reversed and the Bill of Complaint dismissed. A decision upon this ground would render unnecessary any consideration of the other questions in the case, which will now be discussed, simply because the Court below appears to have attached some importance to them and to have decided them all erroneously.

II.

The instrument in suit is not a "refaccion" contract, and gave no tacit or general lien on Gandia's property.

The Bill of Complaint describes the instrument in suit as a "contract of *refaccion*" (Rec. p. 1), and the complainants have contended that it thereby constituted a general lien upon all Ramon Ruiz Gandia's property. The instrument does

not so describe itself. It describes the lien held by *Goenaga* as a "deed of *refaccion*" (Rec. p. 4); it reserves the right to incur the expenses required by the plantation for "the necessary *refaccion*"; and it refers to "the *general obligation* which he [Gandia] hereby makes of all his property" (Rec. p. 5), but it confines the *express lien* to the future crops. Neither by its terms, nor by operation of law, does it create any lien on Gandia's interest in the plantation itself.

A contract of "*refaccion*" is somewhat analogous to a mechanic's lien, being for money lent to pay for work done or materials furnished. Alcubilla defines the term "refaccionary creditor" (*acreedor refaccionario*) as "he who lends money or materials to construct or repair a building", and explains that, until certain modifications made by the Mortgage Law, such a creditor had a tacit legal mortgage upon "the value of *the said building*" in preference to other mortgage creditors, even prior in date (Dicc. Adm. Esp. 5th Ed. Vol. 1, p. 166). The general rule goes back to the *Partidas*, in which it is thus expressed.

> "If any one shall have received money "lent by another to equip or repair a ship, or "to build a house or other building, or to re- "pair it; those things, in which the money "shall have been laid out or expended, shall "be tacitly bound unto him who lent it."
>
> (Part. V, Tit. XIII, Ley 26).

By the Spanish Civil Code, this preferential lien attaches only to the property "which has been the *object* of the *refaccion*" (Art. 1923, subd. 3). In the translation published by the War Department in 1899, the word "*refaccion*" is

translated "agricultural loan", but is itself inserted in parenthesis to show that the translation does not, or may not, convey a precisely equivalent meaning. A French translation by A. Levi, published in 1890, is more exact and translates the phrase: "les biens * * * qui ont été l'objet de la *réparation*".

The present Civil Code of Porto Rico (Sec. 1824, subd. 4) follows the language of the War Department translation above mentioned, and in like manner retains the word "*refaccion*" in parenthesis, thus showing an intention to preserve the original meaning, and not to change or enlarge it.

It reads as follows:

> Sec. 1824. With regard to certain real property and rights on realty of the debtor, the following shall have preference:
>
> * * *
>
> 4. Mortgage and agricultural credits (*refaccionarios*) entered and recorded in the registry of property, with regard to the property mortgaged, or which had been the object of the agricultural loan (*refaccion*).

In the case at bar, the loan secured by the instrument in suit was not advanced for the construction or repair of any building, or even for the expenses of working the plantation; it was simply and expressly "for the payment of the lease". Thus it was not a "*refaccion*" contract, nor even an "agricultural loan"; it was simply an ordinary debt for money lent to a tenant to enable him to pay his rent.

In the court below some decisions of the Supreme Court of Spain in regard to "*refaccion*

contracts" were cited by the complainants, but in all of them there was present the element of building done or material furnished. They were fully considered by Judge Hamilton in his decision upon the Goenaga intervention, which is appended to this brief (see p. 27). Further discussion of this point would be merely useless repetition.

III.

The complainant's claim is barred by limitation or prescription and has not been kept alive by subsequent recognition.

The indebtedness was due in December, 1865, when the instrument in suit was made. This instrument gave to the creditor further security, but did not by its terms grant any further time to the debtor. The lien which it created on future crops could not be enforced until the crops came into existence, but if it created any lien on the property itself, such lien was enforcible immediately, and prescription at once began to run against such right of enforcement.

This suit was begun in January, 1908, more than *forty-three* years after the claim which it asserts accrued, if it ever did, and is therefore barred by prescription, whether the twenty or the thirty year period applies.

Under the present Civil Code the period applicable is twenty years, if the instrument be regarded as a mortgage, otherwise fifteen years.

"§1865. A mortgage action prescribes after "twenty years, and those which are personal "and for which no special term of prescrip- "tion is fixed, after fifteen years."

(Same as §1964 Spanish Civil Code.)

In the earlier law it was provided:

"Where, in connection with the obligation "there is a mortgage, or where the obligation "is mixed, personal and real, the debt is "barred by prescription in thirty years, and "no less."

(Novisima Recopilacion, Lib. XI, Tit. VIII, Ley 5;-Ley 63 of Toro).

Evidently recognizing the completeness of this bar, the complainants have sought to avoid it by attempting to set up certain alleged recognitions of the lien in 1882 and 1883. These are too indefinitely and insufficiently pleaded to tender a proper issue. The complainants merely refer to certain instruments and set up the pleader's opinion as to their legal effect; they do not plead the terms of the instruments themselves, so that the Court may reach its own conclusion. These allegations were evidently inserted in anticipation of the plea of prescription, instead of being reserved, as might more appropriately have been done, for a special replication, under the practice prevailing before the new Equity Rules. In fact, no replication at all was put in, so that on the record the plea of prescription stands admitted in point of fact, and challenged only on the ground of legal sufficiency. However, the pleadings are somewhat loose on both sides, and at the present stage of the case, a decision on a mere technicality of pleading

would doubtless be inappropriate. But a decision overruling the defence of prescription without any examination of the tenor, scope and effect of the alleged recognitions, especially after the express recommendation of this Court upon the former appeal (223 U. S. at p. 67), was more than merely inappropriate, it was manifest error and obvious injustice.

Upon the application for leave to answer it was made clear that the alleged recognition of 1882 was at most a mere recital, *by the recording officer*, of encumbrances apparently existing of record, and was not executed or assented to in any way by the new owner (see Rec., pp. 2, 15); and that the alleged recognition of 1883 was actually an acknowledgment of the payment of an indebtedness of approximately the same amount as the claim now in suit (see Rec., pp. 11, 14, 18). In any event, the instrument of 1883 contains no recognition or acknowledgment of the claim in suit, or any other specific claim, as then valid and subsisting either as a debt or a lien. It merely recites that, as to certain liens upon the property, referred to, but not described or identified, "Mr. Gallardo * * * has been paying the same on different installments fixed by mutual agreement with the creditors" (Rec., p. 18). This was also pointed out by Judge Hamilton in his opinion on the Goenaga intervention (*post*, p. 30).

The total insufficiency of the alleged "recognitions" was so clearly shown on the application to set aside the order taking the bill [redacted] *pro confesso*, by authenticated copies of public records, that it was more than a mere abuse of discretion—it was legal error—to proceed to a decree of foreclosure.

When a Bill is taken *pro confesso*, it is

> "taken to be true in all matters alleged with "sufficient certainty; but in respect to mat- "ters not alleged with due certainty, or sub- "jects which from their nature and the course "of the Court require an examination of de- "tails, the obligation to furnish proofs rests "on the complainant."
>
> See Thomson *vs.* Wooster, 114 U. S. 104, at p. 111, *quoting* Williams *vs.* Corwin, Hopkins Ch. 471;
>
> Central Railroad Co. *vs.* Central Trust Co., 133 U. S. 83, at pp. 90, 91.

In the case at bar, the Court below was expressly charged by the former decision of this Court with the duty of further investigation and consideration of the nature and effect of the alleged "recognitions," so vaguely and insufficiently pleaded. But instead of requiring the complainants to "furnish proofs" and at least submit to the Court the public records to which they referred, the Court proceeded to a final decree as a matter of course, and apparently ignored the showing made by the defendants of the manner in which the public records contradicted, instead of supporting, the allegations of recognition. Moreover, this is a case in which prescription is a peculiarly equitable and appropriate defence, in view of the condition of the public records, the death of the original parties to the transactions, the difficulty of proving the actual facts after this lapse of time, and the manifest probability that the claim in suit was long since paid.

IV.

The complainants were not entitled to the remedy of foreclosure, and the action of the Court below in refusing to reopen the case was an abuse of discretion.

In order to foreclose a mortgage in Porto Rico, the creditor must produce with his initial petition, "the instrument or instruments evidencing the credit, with a memorandum of their record", "a certificate issued by the registrar of property of a date subsequent to that of the maturity of the obligation, to the effect that the mortgage has not been cancelled, and is not awaiting cancellation, according to the day book", and a copy of the record of all other encumbrances upon the property and of conveyances to third persons.

> See Regulations for Execution of Mortgage Law, Art. 169;
> (Now §7266, Porto Rico Rev. Stat.)
> Also Mortgage Law, Art. 128;
> (Now §6812, Porto Rico Rev. Stat.)*

This is merely the present application of an ancient rule of Spanish Law, going back to the *Novisima Recopilacion*, which provides, in regard to mortgages, that, without their record in the Registry, "no judge shall have power to adjudicate upon such instruments, nor shall they be evidence for such purpose".

> See Nov. Rec. Lib. X, Tit. XVI, Ley 3, subd. 2.

*For convenience, the latest revision (1911) of the Statutes and Codes of Porto Rico is used for these citations.

Now embodied in substance in Mortgage Law, Art. 389; Porto Rico Rev. Stat. §7073.

The Mortgage Law of 1869 required the transfer of the old records to the new Register to make them fully effective.

"The records contained in the books of the "Registry on file in the offices of *Contadurias*, "*Anotadurias* or *Receptorias* of Mortgages, "shall have the effect they would have under "the laws in force prior to the date the Mort-"gage Law went into effect in the respective "islands beyond the seas, if said records shall "have been or are transferred to the modern "books of the registry."

Art. 397, Mortgage Law; §7081, Porto Rico Rev. Stat.

Such transfer was required to be made within a year, and, if not petitioned for within that time, "it shall not operate to the prejudice of third persons."

See last citation;
Also Regulations, Art. 449; Porto Rico Rev. Stat. §7546.

The right of transfer to the present records is still preserved, with the added safeguard of an appeal to the Insular Supreme Court.

When a registrar of property refuses "to record or to give its full effect to any document which may be presented to him for recording or for the annotation of the contents thereof, whether it be a deed, a decree, a mortgage, &c.," he shall set out the reasons for his refusal, and

serve notice of his action upon the interested party, who may then appeal to the Supreme Court, which must decide in a summary manner. He must also make an entry of the presentment and refusal, which entry is effective for four months.

See Act of March 1, 1902, now §2180 Porto Rico Rev. Stat.

In the case at bar, the Bill of Complaint alleges that the instrument sued on was duly "presented in the present Registry on the 9th day of April, 1906" (Rec. p. 2), but not that it was inscribed or recorded therein. On the contrary, it appeared upon the application to re-open the case, that the Registrar *refused* to make the transfer requested, on the ground that the instrument sought to be transferred only affected the *products* of the plantation, and did not constitute a lien upon the *property* (Rec. pp. 11, 13). He accordingly issued merely a "cautionary notice" (Rec. p. 13) good for four months under the Act of 1902, *supra,* or for a shorter period (60 days) if the provisions of the Mortgage Law be deemed to apply (See Mortgage Law, Art. 96; Porto Rico Rev. Stat. §6780). The effect of this notice, if any, has long since expired. Instead of pursuing their obvious remedy of an appeal to the Insular Supreme Court, the complainants elected to bring this suit. As it was not maintainable under the laws of Porto Rico, it was not maintainable in the Federal Court. Federal Courts of Equity follow their own *procedure,* but in matters depending on the effect of record of instruments affecting real property they are bound by the local law.

See Olcott *vs.* Bynum, 17 Wall. 44, 58.

The Bill of Complaint thus failed to show compliance with the necessary conditions precedent to the bringing of the suit, and, on the motion to reopen the case, it was shown that the conditions had *not* been complied with, and that complainants had neglected their legal remedy of an appeal to the Supreme Court of Porto Rico from the adverse decision of the Registrar.

It is, moreover, quite evident that defendants' failure to answer within the time fixed by the order of June 20th, 1912, was due to a very natural and excusable misunderstanding of the situation by their then attorney (Rec. pp. 10-12).

The action of a Trial Court in refusing to reopen a case after taking a Bill *pro confesso*, is usually to be regarded as a matter of discretion and not reviewable here. But in the present case, the defendants called to the Court's attention, before the entry of any final decree, the existence of several complete defences to the suit, supported by public records. In like manner, the action of the Trial Court, in refusing to suspend the entry of the final decree until the decision of the Goenaga intervention, worked grave injustice to the defendants. It is evident from Judge Hamilton's opinion that had the entry of decree been thus stayed, pending consideration of the effect of the alleged "recognitions", it would never have been entered at all, and complainants' claim would have met the same fate as that of the would-be intervenors. In view of all the circumstances, the action of the Trial Court, unexplained by any opinion, was so clear an abuse of discretion, that it may appropriately be reviewed here in connection with the necessary review of the manifest legal error in foreclosing the instrument in suit as a mortgage encumbering the plantation as a whole.

Summary.

1. The instrument in suit was not a mortgage of the plantation; by its terms it covered only future crops; it was made by the owner of an undivided interest and lessee of the rest; and it cannot bind the other interests.

2. Such instrument was not a "*refaccion*" contract, and created no general or tacit lien upon the property.

3. The claims of the complainants were barred by prescription, and have not been preserved by subsequent recognition.

4. The instrument in suit has not been recorded in the present Registry and cannot be foreclosed as a mortgage.

5. The refusal of the Court below to reopen the case was an abuse of discretion.

CONCLUSION.

The decree appealed from should be reversed and the Bill of Complaint dismissed.

Respectfully submitted this 23d day of November, 1914.

FREDERIC R. COUDERT
HOWARD THAYER KINGSBURY
Counsel for appellants,
2 Rector Street,
New York.

APPENDIX.

Opinion of Judge Hamilton.

IN THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

JOSEFA RUIZ DE NOBLE *et al.*, Complainant, *vs.* ELISA GALLARDO Y SEARY, *et al.*, Respondent.	**No. 524, Equity. San Juan.**

REFACCION AND LIMITATIONS.

N. B. K. Pettingill, Attorney for intervening petitioner.

Travieso & Yriarte, Attorneys for defendants.

HAMILTON, J.:

This is a petition in the nature of a bill of intervention, to which answers have been filed, and a plea of the statute of limitations has been interposed. It is now submitted upon the merits, the only evidence noted being documentary. It consists of exhibits and papers filed in the main case, and also certificate of Registrar of Property at San Juan of inscription of the finca of "San José Cacigue" in 1912, and of the entries in the old Anotaduria of Mortgages in 1864.

The facts of the case were examined by this court and are found in an opinion by Judge Rodey dated July 6, 1909.

It seems that in the year 1864 Ramon Ruiz Gandia was indebted to Rufino de Goenaga, ancestor of the intervenors, in the sum of six thousand and sixty-three and 35/100 dollars for which a notarial instrument was given, now claimed to be a refaccion. This was recorded in the Anotaduria de Hipotecas. It is claimed to recover the plantation of San José de Cacique. The actual ownership, however, of Gandia had been not of the whole but of an undivided interest, but he also leased the interest of his co-tenants. The same contract was continued for several years, and, while the bill alleges that it is still unpaid, the answer sets up that it has been paid. Said Gandia became bankrupt and in the course of the proceedings Ricardo Gallardo, ancestor of the defendants, bought the plantation. It is alleged on the one side and denied on the other that he recognized the lien now in question.

Several defenses are set up to the bill, among them that the instrument in question was not a mortgage of the land, that the claim has prescribed, and has been paid. There is no question that the original contract was recorded in 1864 as a refaccion mortgage, but at the time of opening new books of record a new Registrar in 1906 declined to authorize the transfer of the old record to the new. The original contract is not in evidence under the ruling of the court, but the renewal of the contract dated 26th of November, 1864, was properly recorded and therefore admitted in evidence and by recital seems substantially to incorporate the excluded paper.

1.—Was this a refaccion contract? The instrument of 1864 recites that that of October 31, 1862, was "a deed of refaccion", and the new instrument

recites that the "parties have agreed by common consent to extend by this document the first contract of refaccion signed on said 31 day of October, 1862, to the 31 day of August of 1865 next." The parties therefore considered the new instrument as a refaccion contract, the changes in the new instrument not affecting this part of the transaction. The contract says expressly that "the aforesaid Ruiz Gandia agreed to faithfully pay said sum (of six thousand and sixty-three and 35/100 pesos) with the crops manufactured by the said estate, and if not sufficient he shall pay with the sugar cane sprouts belonging to him and which by this contract are encumbered with the crops, and Ruiz shall also pay all the sums which Goenaga shall advance him thereafter . . . All the crop, that is to say sugar manufactured by the estate San José de Cacique, is hereby mortgaged, specially and expressly, and if it should not be sufficient, then the sugar cane sprouts of the said estate, in order that it shall be satisfied." And it continues that "Gandia cannot make any other agreement of refaccion with any other person during the time agreed upon in the present deed of extension and until the debt to Goenaga shall have been completely paid."

> "By *refaccion credit* is meant, that which arises from the *refaccion contract*, which is so called after the Latin verb *reficere*, to remake, to make over again, to bring into existence that which without the help of new works is going to perish.
>
> "Amongst the Romans, such credit gave only a right of action *in personam*, unless it was expressly stipulated that the property to be repaired or constructed should be mortgaged, except when the money advanced was to be used for rebuilding a building almost in

ruins, in which case, a tacit mortgage was recognized in favor of the creditors, which mortgage was called: *ne urbs ruinis deforme tur.*

"Laws 26 and 28, Title 13, Partida 5, merely declared that the 'refaccion creditor' should have a legal mortgage upon the house that had been rebuilt or repaired, but without determining how the execution of the contract was to be proven, nor the conditions that should appear in the contract, the only requirements being the receipt of the money for the work to be done and the investment of the amount in the said work."

Sentences of the Supreme Court of Spain, of Dec. 1, 1868, and of April 13, 1882.
2 Galindo & Escosura's Comentaries on the Mortgage Law, page 521.

So far as its express terms go the lien given is on the crop and rattoons, and in Porto Rico at least the rattoons hardly renew themselves for more than three or four years. "To the fulfilment of all that has been set forth in the present deed, the appearing party hereto binds his present and future property, with the clause which allows courts to have the same carried into execution . . . renounce all laws and rights in his favor," says the contract, and it also expresses the "understanding that the general obligation as to property is not to abolish or impair the special obligation, and on the other hand the latter is not to abolish or impair the former, as Goenaga can make use of either as he may deem best, the crop . . . is hereby mortgaged, specially and expressly."

2.—It is contended that the provision as to general obligation refers to a tacit mortgage which

the law gave to the refaccion creditors upon the real estate benefited. In this way it is claimed, that, while the terms of the contract refer to crop and rattoons only, it also expressly refers to the general law, which extends the lien to real property.

This has been held by the Supreme Court of Spain applicable to building a railroad track. 60 Jurisprudencia Civil, 909, Dec. 30, 1886. It has also been held that "there being conceded by the ancient legislation applied in the present case to the refaccion creditors a tacit mortgage and preferences upon the thing subject to the refaccion superior to all creditors not specially privileged." 63 Jurisprudencia Civil, 837, May 26, 1888.

So as to pipes furnished to a water company, wherein it was held that both the Roman law and the Partidas recognized the doctrine of tacit mortgage and preferential lien upon the "finca refaccionada" for all indebtedness "que hayan servido para comprar, fabricar, ó reparar nave, ó edificar casa, ó comprar tierra ú *otras cosas semejantes*".

3.—The cases cited go somewhat upon the principle of salvage in admiralty, giving a tacit lieñ upon vessels, houses or lands for the money used in building or preserving them. It cannot be said, however, that it is at all clear, that, when the contract on its face refers to making a crop, it is to be construed as applicable to the land, the more especially where, as in this case, the party making the refaccion contract was the owner of only an undivided interest in the land. It is true that he was in control of the whole property, but the lien recitals should probably be limited to the interest which he had, that is to say, ownership as to an undivided interest and leasehold as to the rest.

So far as appears, the leasehold must have long since expired.

"Law 3, Title XVI, Book X of the Novisima Recopilación, declared that in order to avoid frauds, suits and damages to purchasers or other persons having an interest in mortgaged properties, an entry should be made in the registry of mortgages of every instrument containing a special or express mortgage or encumbrance of real property, and provided at the same time that the mortgaged property should be designated therein by an expression of their names, area, location and boundaries; and that the term *real property* should be taken to include, besides houses, hereditaments and other rights in the realty, the annuities (censos) and other perpetual rights which might be the subject of an encumbrance or mortgage; and that in case the registration should be omitted, the said instruments should not be used as evidence at the trials or outside of the trial, for the purpose of foreclosing the mortgages.

From such legal provisions it must be inferred:

1.—That a general mortgage over all of the properties of the debtor had been left without force or effect, inasmuch as the registration thereof not being required, it was supposed that there could be no fraud, nor suits, nor damages to any purchaser or party interested in the land, which would not carry with it the burden of the mortgage, *when transmitted to a third party.*

2.—That inasmuch as the mortgaged properties had to be designated by an expression of their names, area, location and boundaries, *future goods or properties* could not be the subject of a mortgage, because they could not be designated in the manner provided by law.

3.—That *personal property* could not be the subject of a mortgage, because the law

referred exclusively to real property and to rights that are *real* in their nature.

4.—That this law introduced in our mortgage system the requirements of *specialty* and *publicity.*

2 Diccionario de Legislación Hipotecaria y Notarial, 67.

4.—It is alleged that the contract was accordingly noted in Book 19 of the old Anotaduria of Mortgages and that the debt was recited as a refaccion debt for advances made for agricultural purposes.

Under the Spanish law, as under the present Porto Rican law, the Registrar had semi-judicial powers, and if he declined to register an instrument an appeal lay from his decision. In this case, however, he registered the paper. There is no citation made showing that this bound any except the parties to the instrument.

5.—Furthermore, if this registration was to be regarded as a precedent, it is neutralized by a subsequent Registrar. When in 1912 it was sought to transfer the old registration above to the new Registry, the present Registrar declined on the express ground that the paper actually placed a lien only upon products to be manufactured and did not place any encumbrance upon the property. The Anotaduria, therefore, was said to have been given a wider scope than was proper, and therefore a mere cautionary notice, good for a limited time, was entered. No appeal was taken from this decision.

Whatever be the powers of the Registrar, however, they are not beyond re-examination by this court when rights are affected that are in suit

here. The Registrar's office is rather administrative than judicial. 80 Jurisprudencia Civil, 907, No. 210. It should be held to determine matters *prima facie*, and a decision by a Registrar may be persuasive, but in this instance there are two which come to opposite conclusions. They cannot be said to throw much light upon the subject or to control the case.

6.—The interval between the contract in 1864 and the petition of intervention in 1909 is thirty-five [*sic* in original; should be *forty-five*] years. It would not seem material whether the thirty years statute of repose or the twenty years statute covering mortgages should be held to apply. Either would be sufficient. It is true that the contract under the foregoing views was not a mortgage except to the extent of the undivided interest in the property. The remainder of the debt would be a personal obligation and barred under Section 1865 of the Civil Code of Porto Rico.

7.—The complainant, however, seeks to avoid the question of prescription by allegation of recognition of the claim in a deed of cancellation of mortgage executed by Gallardo on August 10, 1883. That instrument refers to liens, but does not necessarily include the claim now in suit. It says that "Gallardo being the owner of the property subject to the liens thereon, he has been paying the same in different instalments." The claims mentioned are said to be those according to the books of the old Anotaduria, and a certificate of the Registrar is that this old book contained a refaccion in favor of Goenaga. This is too general to amount to an express recognition of the claim at bar and stop the running of the statute of limitations or the principle or statute of repose.

8.—This case is not governed by what is called the Mortgage Law, as that was adopted after accrual of the rights now urged at bar. 64 Jurisprudencia Civil, 256. The law governing the Anotaduria de Hipotecas is much older. It goes back to the Novisima Recopilación, Title 16, Law 3. It was abolished by royal decree of February 28, 1879, but that did not affect the rights in this case.

It follows from the above discussion that the bill of intervention is not sustained by the proof and must be dismissed.

Signed PETER J. HAMILTON,
Judge.

San Juan, P. R., June 6, 1914.

UNITED STATES OF AMERICA,
District of Porto Rico, } ss.:

I, ANTONIO AGUAYO, Clerk of the District Court of the United States for Porto Rico do hereby certify that the foregoing is a true and correct copy of the original opinion in the above entitled cause as the same appears on file and of record in my office under date of June 6th, 1914.

WITNESS my official signature and the Seal of said Court, at San Juan in said district, this 8th day of June, A. D. 1914, and in the 138th year of the Independence of the U. S. of Am.

(SEAL)

ANTONIO AGUAYO, Clerk.
By: L. A. GROSS, Deputy.

Office Supreme Court, U.
FILED
JAN 19 1915
JAMES D. MAHER
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 141.

ELISA GALLARDO Y SEARY, *et al.*,
Appellants,

vs.

JAMES R. NOBLE, *et al.*

MEMORANDUM IN REPLY FOR APPELLANTS.

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Supreme Court of the United States,

OCTOBER TERM, 1914.

No. 141.

ELISA GALLARDO y SEARY *et al.*,
Appellants,

vs.

JAMES R. NOBLE *et al.*

Memorandum in Reply for Appellants.

The brief submitted on behalf of the appellees is an ingenious attempt to disguise the complete lack of equity of their case by specious and plausible arguments directed almost entirely to subsidiary questions. The cardinal facts that the alleged lien sought to be foreclosed was created, if at all, in 1865; that the mortgagor was only a part-owner and lessee; that the debt was for money lent with which to pay *rent;* and that the alleged recognitions did not, and could not, in any event, extend the scope of the lien, are passed over almost in silence.

In order not to burden the Court with extended discussion of mere collateral questions, this mem-

orandum in reply will be confined to a brief summary of the principal reasons why the elaborate arguments of appellees' counsel are of no avail.

I.

The Statement.

The additional extracts from the Bill of Complaint, to which attention is called on pages 2 and 3 of Appellees' Brief, so far as they contain anything not included in appellants' statement, are merely allegations of law, and therefore were not admitted by the demurrer and add nothing to plaintiffs' case. The instrument in suit must stand or fall on its own terms, and on the law applicable thereto; not on the pleader's allegations as to its legal effect. In like manner the allegation that Gallardo "was required to recognize" the alleged lien, and that it was so recognized, "as appears duly noted in said register", cannot extend the legal effect of what was actually done, or substitute the pleader's theory for the proper legal conclusion from the facts.

II.

The nature and effect of the instrument in suit.

A. Appellees' counsel apparently misapprehended appellants' arguments on this point, which are:—

First, that the instrument in suit created a lien merely on the crops; and

Second, that, *in any event*, it did not and could not bind the title of co-owners.

The second contention is not, as suggested in Appellees' Brief at page 6, an inference or conclusion from the first; it is separate and independent. On its face, the instrument created a specific lien on the crops only, and bound the whole property of the debtor only as any debt may do. But assuming for the purposes of the argument that, in spite of the provisions of the Spanish law which apparently prevented *express* general mortgages, this general obligation was operative as a lien on real property, *nevertheless*, it could only bind the real property which belonged to the debtor, and did not and could not affect his co-owners.

B. Appellees' argument that the recital of the instrument in suit in the Registrar's list of encumbrances when Gallardo took title to the plantation estops Gallardo and his heirs (the appellants) to deny that it bound the *whole* plantation is an unwarranted inference from a purely conjectural premise. Appellees say that Gallardo *must* have included a recognition of this alleged lien when "he requested the inscription of his possessory title" (Appellees' Brief p. 23), but the Registrar's certificate does not show that he did so (Rec. p. 15), and the allegation of the Bill (Rec. p. 2) is too vague and argumentative to serve as the basis for any adjudication on this point.

Even assuming for the purposes of the argument that Gallardo did, in some way, expressly

take the property subject to whatever lien was created by this instrument, this would not extend the lien to cover any *other* property, or any *greater interest* in the property, that it covered by its own terms. If it covered the crops, then Gallardo, on this assumption, would have taken the property subject to a lien on the crops; if it covered the original debtor's undivided interest in the plantation, then Gallardo would have taken the plantation subject to such lien *on the undivided interest*. In no event could the mere recital or recognition of a lien extend its scope.

C. Appellees argue, under their Point II, that the instrument was a *refaccion* contract, and imposed a tacit mortgage upon the plantation as a whole (Appellees' Brief, p. 25). Their argument as to the effect of a *refaccion* contract reduces itself to this; that, where real estate has been *benefited* by the money lent, the creditor has a tacit lien thereon even if the loan was not made to the owner of the property (Appellees' Brief, p. 29). Even if this be true, it is wholly irrelevant here. The money lent by Noble to Gandia did not benefit the real estate, but merely benefited Gandia personally as lessee. The Bill alleges that the money was lent "for the support and *refaccion* of the plantation" (Rec. p. 1), but the instrument itself, which is annexed to the Bill, and is necessarily controlling, recites that the money was lent "for the payment of the lease" (Rec. p. 4). Had the money not been lent, Gandia might have lost his leasehold; but it does not follow that the plantation would have suffered, for the other owners might have been able to conduct it profitably, as

they have apparently done since one of them (Gallardo) took it over.

The reason for the tacit lien afforded by *refaccion* contracts thus wholly fails in this case, and it becomes evident that the payment of rent is not a "similar thing" to the repair of a house (Appellees' Brief, p. 28), and that such payment did not "benefit" anything but Gandia's leasehold. None of the decisions cited by Appellees on this question holds that the loan of money with which to pay rent gives rise to a *refaccion* lien, and their reasoning, far from supporting such a proposition, is wholly inconsistent with it.

III.

The Defense of Prescription.

It must be remembered that this claim is of the stalest—over forty years old when the Bill was filed. All the equities and all the presumptions are against it, and all doubtful questions should be resolved adversely to it. As suggested in Appellants' Brief (p. 15), this case should not be decided here on technical refinements of equity pleading, especially as it comes from a jurisdiction in which, as previously pointed out by this Court in this very case (223 U. S. at p. 66), equity procedure is a novelty.

The arguments of appellees,

(a) that the defendants' plea was "duplicitous" because several different periods of limitation were pleaded together (Appellees' Brief, p. 32);

(b) that the plea did not specifically mention the statute which the appellees deem applicable (Appellees' Brief, p. 35); and

(c) that the demurrer was unavailing because coupled with a plea (Appellees' Brief, p. 48); may be dismissed with very brief comment.

The defendants clearly pleaded the thirty year period of limitation. This necessarily included all the shorter periods and their specific mention could prejudice no one. The essential fact pleaded was the lapse of time; the reference to specific statutes was surplusage, and therefore immaterial even if erroneous. No objection seems to have been made in the Trial Court to the coupling of the demurrer and plea, and such an objection now is too late and too technical.

On the record as it stood in the Trial Court, it was apparent that the alleged lien sought to be foreclosed did not in any event cover the whole plantation, and for this reason, if for no other, the demurrer should have been sustained. In addition to this, it also appeared from the pleadings that the alleged cause of action was barred by limitation, unless the recognitions, adumbrated but not explicitly pleaded in the Bill, were sufficient to toll the statute. On this question, either the plea should have been sustained, or the plaintiffs required to give proof of the facts. In either case, the decree of foreclosure and sale of the *whole* plantation was erroneous.

IV.

The Procedure Below.

On the questions of procedure discussed by appellees, mainly under their Point IV, appellants are willing to rest on their principal Brief. These questions are merely ancillary to the basic questions already discussed. They were presented in the main brief principally to show that not only had the Trial Court made an erroneous decision, but that it had rejected every opportunity to ascertain and determine the real merits of the cause, and also that the plaintiffs' case was as lacking in technical pre-requisites as it was barren of substantial equity.

There is nothing in the Record to suggest that any evidence was taken in the Trial Court before the entry of the decree, or that the so-called "findings" are based on anything but the Bill. The cases cited by appellees on page 18 and 19 of their Brief were none of them on *pro confesso* decrees, and it is manifest that in the present case this Court can look only to the pleadings and cannot assume that there was any evidence additional thereto. The defendants were heard "as to the *form*" of the decree (Rec., p. 24; Appellees' Brief, p. 17), but there is nothing on which to base even an inference that any proofs were taken to supplement the insufficient allegations of the Bill. The fact that the decree goes beyond these allegations is one of the errors of which appellants complain.

So far as Judge Hamilton's opinion on the Goenaga intervention is concerned, it may be left to speak for itself, not as controlling in this Court, but as the latest expression of the Court whose

decree is here under review, contained in a carefully reasoned opinion, and not in a mere unexplained decision.

CONCLUSION.

The appellees' arguments do not sustain the decree appealed from and it should be reversed.

Respectfully submitted this 18th day of January, 1915.

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JAMES D. MAHER
Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914

No. 141

ELISA GALLARDO Y SEARY ET AL., APPELLANTS,

vs.

JAMES R. NOBLE ET AL.

APPEAL FROM UNITED STATES DISTRICT COURT FOR PORTO RICO.

BRIEF FOR APPELLEES.

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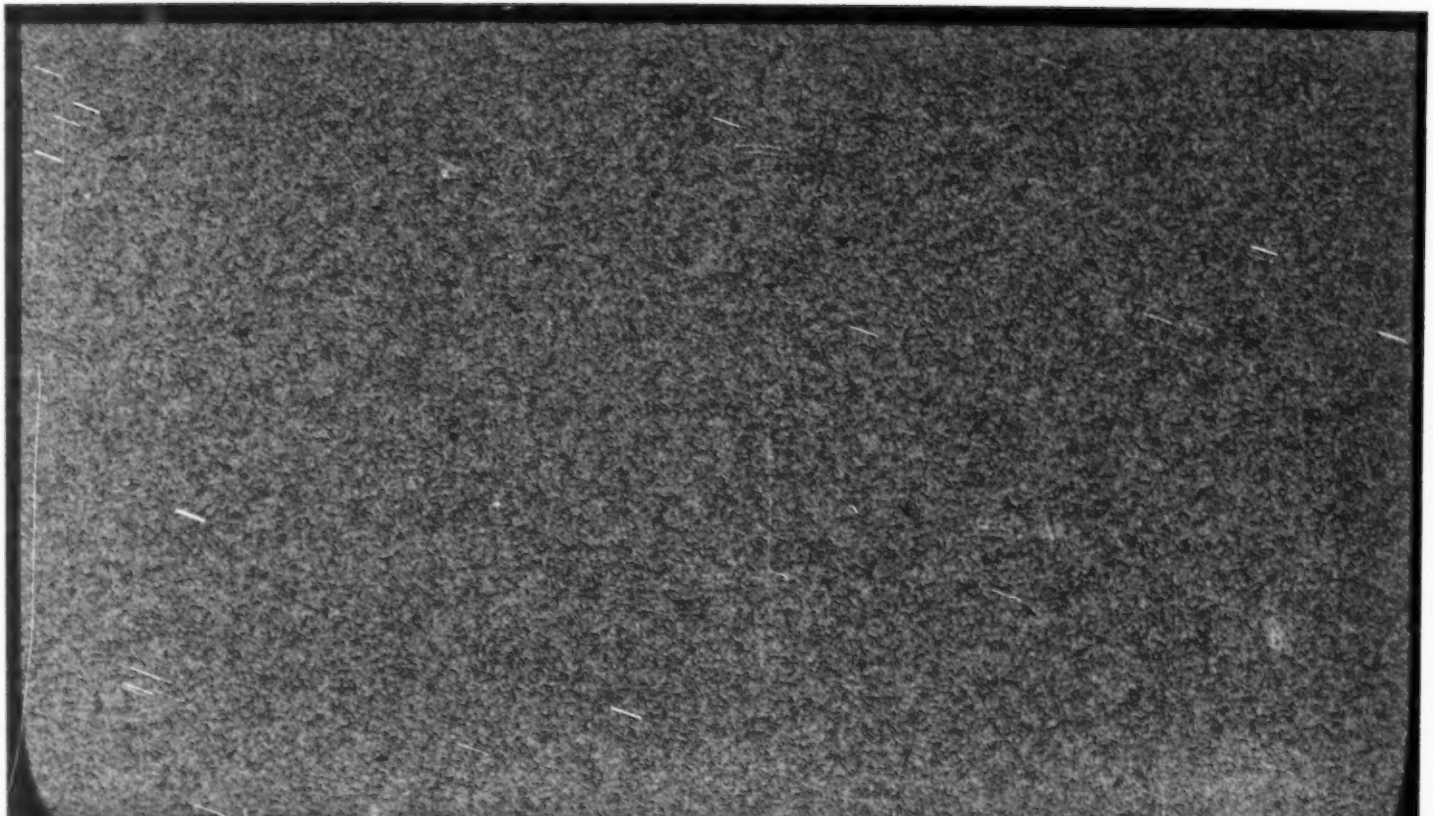

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BRIEF FOR APPELLEES.

Statement.

This is the second appearance of this case in this court. The first result below was a decree dismissing the bill of complaint, entered in July, 1909, on the ground that complainants were barred by laches. From that decree the present appellees (including their mother, since dead), appealed to this court and secured a reversal with a direction that the

cause be "remitted to the district court for further consideration." Such further consideration resulted in a final decree of foreclosure for the complainants, from which the defendants below (former appellees) are now appellants.

So far as the *statement* introductory to the brief now on file for the appellants is confined to *facts*, we accept it as correct, except for certain omissions which might lead to incorrect inferences unless supplied. So far as it expresses opinions and deductions, their correctness can best be tested by the strength or weakness of the argument supporting them and, of course, is not accepted by us. To supplement the *statement* made in the brief for appellants we call attention to the following particulars from the record:

(1) Connected with the allegations of the bill as to the character of the instrument upon which it is founded, as summarized on page 2 of their brief, is the further allegation that (Record, page 1, bot.)—

> "the said provision contained in said deed providing for its registry in the then existing book of mortgages was made in pursuance of the law then in force in Porto Rico to the effect that such indebtedness should be liquidated as to its amount by public document which might, when so liquidated, be recorded, and should thereupon become a lien upon the land therein described and against which it was so recorded; and that, in pursuance of said law, the said deed was so recorded in the old 'Anotaduria' in"

a specified book. Thus it is alleged, contrary to the intimation of their *statement*, that the lien covered the land itself, otherwise it could not properly have been recorded in the "Anotaduria."

(2) Where the *statement*, near the bottom of page 2, purports to summarize the allegations of the bill touching the ownership of the property and the recognition of the debt by the ancestor of appellants, such summary is quite deficient. The language of the bill in that regard is that (page 2, middle)—

> "upon a settlement of the bankrupt estate, the above mentioned Ricardo Gallardo, one of the co-owners in said plantation with said Ruiz (the bankrupt), acquired title thereto, but subject to various liens in favor of different persons, and among them the lien of said William Noble as hereinbefore set forth; that thereafter said Gallardo obtained from the proper court a possessory title as owner of said plantation, and, upon applying for the registry of said title in the year 1882, he was required to recognize as valid liens, and agree to pay, all such liens as appeared against said plantation upon the books of the old registry, among which was the lien hereinbefore described; and that the validity and existence of said indebtedness and its lien upon said plantation was so recognized by said Gallardo, as appears duly noted in said registry," etc.;

and that (page 3)—

> "in the year 1883, and during the lifetime of said Ricardo Gallardo, the latter executed a further notarial instrument wherein he recognized the validity and existence of the said indebtedness hereinbefore described and of the lien thereof upon said plantation; and that by said repeated recognition of the same the running of the statute of prescription has been interrupted," etc.

Thus it is alleged not only that Gallardo "acquired title," but also how he acquired it; that the whole property *as acquired by him* was *subject to* this lien now foreclosed; and that he had recognized the lien as against his title and the validity and existence of the indebtedness underlying it. Hence, the propriety of the decree as against the whole property.

(3) Near the bottom of page 3 of their brief it is stated that "defendants' counsel applied informally to Judge Charlton for an extension of time" to file an answer, and that "no action was then taken." Although a reference is made to the page of the record supposed to support it, such a gen-

eral statement may unintentionally mislead. If the cited portion of the record be perused it will be seen to be a paragraph of the affidavit made by counsel then representing appellants wherein the facts stated fall far short of constituting any sufficient application whatever, informal or otherwise. It shows merely a conversational suggestion to the judge of a *desire to apply*, without the filing of any paper, without any attempt to give notice even of such desire to opposing counsel, without an intimation that any knowledge of such desire, or of the making of such oral suggestion, ever reached opposing counsel, and without intimation that the affiant ever gave the matter further attention or effort. To the contrary, he states that "having brought to the attention of the court the fact that he desired an extension of said time to answer (he) felt as if no formal petition was necessary to attain the said end." Hence the fair statement would be not that "no action was then taken," but that *no action was ever asked.*

(4) At the bottom of page 3 of their *statement* the date of the entry of the order *pro confesso* is correctly given as July 11, 1912, followed by the statement that "thereafter an application was made by defendants to set aside this order," etc. It is but fair for the court to bear in mind in this connection that *about four months* had elapsed, that is, from July 11 to November 8, before any application to open the *pro confesso* was even filed in the clerk's office.

It is also stated (page 4) that "an affidavit of merits and a proposed answer were submitted," which is correct with an omission to state the time—the affidavit of merits was submitted with the application, the proposed answer not until the hearing. A further inaccuracy includes the document entitled "Acquittance" (page 17) as among those "claimed to constitute the recognitions of the mortgage." While we think it does, in fact, contain a recognition of the instrument in suit as a mortgage binding the land in the hands of Gallardo, there is nothing in the record indicat-

ing that it was offered on behalf of the complainants; on the contrary, it was *produced by the defendants* as proof of the averment made in their affidavit of merits that the Noble debt *had been paid* (page 11, bottom).

Of course, that averment was made under a misapprehension by counsel of the import of that instrument (doubtless because of the similarity in the amounts of the two debts), and after the mistake was discovered it was admitted in their proposed answer, tendered three weeks later, that "they have no information whatever as to whether or not the said Ruiz Gandia ever paid the said Noble the said sum or any part thereof," and that "respondents are not in a position to answer and allege whether Noble's indebtedness and claim against Ruiz Gandia was ever proved, allowed and paid by the trustees of the latter's estate" (page 21, par. VI).

(5) In the last paragraph of said *statement,* on page 4, allusion is made to a discrepancy between different provisions of the final decree as to the amount adjudged to be due and a larger amount mentioned in the subsequent paragraph directing the sale of the property in case of non-payment of the debt. The amount due is first definitely adjudged to be the principal debt of $8,093 together with $14,540 as "interest thereon at the legal rate of six per centum per annum from the first day of January, 1883, the date of acknowledgment by Gallardo" (page 25). The larger amount will be found to be the equivalent of the same principal with interest from the time the debt fell due, or January, 1867; but the court below held that Gallardo and his heirs should be required to pay interest only from the date of his recognition of the debt. The larger amount was left in that particular paragraph of the decree by mistake and may simply be regarded as surplusage, as it is not the paragraph fixing and adjudging the amount to be paid.

(6) Allusion is also made on page 4 of their *statement* to the "able opinion" of Judge Hamilton subsequently rendered upon the intervention of the Goenaga Succession under another similar mortgage, as though it were thereby established that Judge Hamilton was right and Judge Charlton wrong. We know of no presumption against or in favor of one judge over another when sitting in the same court. Both decrees were subject to appeal and both have been in fact appealed from, the appeal of the Goenagas from Judge Hamilton's recent decision being now docketed in this court under No. 749. It has been said that the weakness of judges is in the writing of opinions, and we hope to demonstrate from this opinion itself as the final point of this brief that his reasoning should have resulted in a decree for the complainants, and would have done so but for one error of law.

ARGUMENT.

Relying upon the well-settled practice of this court that errors assigned but not insisted upon and supported by argument are considered as abandoned, we will content ourselves with answering in order the points made by counsel for appellants, with such subdivisions as may aid to greater clarity, and then commenting briefly upon Judge Hamilton's later decision on the intervention, upon which so much stress is laid.

POINT I.

This point, as stated for appellants, contains two distinct propositions: (1) That the instrument in suit created a lien merely on the crops, not on the real estate, and (2) that therefore it did not bind the title of co-owners. It may be admitted without hesitation that, conceded the first proposition, the second necessarily follows, *unless* the appellants are prevented from so claiming by estoppel or by recognition

of the lien. Certainly a lien upon crops *alone* is not a lien upon the land and binds the *title* of nobody in the absence of such estoppel or recognition.

While we controvert both the above contentions, their allowance would not necessarily result in a reversal of the decree below. For, even had the lien of the contract not bound the interest of Ricardo Gallardo as a co-owner at the time it was made, it might still bind his interest *as sole owner* by virtue of subsequent purchase and acquisition of an independent title subject to it. We therefore rest our denial of the validity of the conclusions reached by appellants in their point I upon three propositions:

(*a*) The instrument *did* create in law a lien on the land.

(*b*) That lien *did* affect the title of Gallardo.

(*c*) Whether so or not, appellants will not be permitted to deny it.

(*a*) *The instrument in suit did create in law a lien on the land.*

To support the contrary contention opposing counsel have quoted the instrument verbatim in their brief, indicating by italics certain portions deemed most material to their contention. Without a verbatim repetition we desire here to indicate certain other provisions material to *our* contentions:

(1) One purpose of the instrument is recited to be to *evidence a liquidation* of an indebtedness previously agreed upon.

(2) Another purpose is recited to be "to carry into effect this agreement in the way and form more suitable in law."

(3) There is a recital of a previous liquidation between Ruiz and one Goenaga, evidencing an indebtedness on

which 1,000 pesos remain due, which "must be paid during the month of October of next year, 1886, thereby being canceled *that deed of refaccion,* and Ruiz obliged not to execute any other agreement or deed with damage to *this present one,*" etc., meaning, we think, that this one also was a deed of *refaccion.*

(4) It is further stated that another purpose of the instrument is for the *better* security of the debt. Therefore, *besides* the special obligation of the plantation described, he thereby creates a general mortgage upon all his property and *expressly* mortgages the *crops.* Thus it is clearly indicated that one species of "security" for the debt already existed under the law, in the special obligation of the plantation—that being a *tacit* mortgage implied by law from the character of the indebtedness, as will be hereinafter explained; and that he desired, in addition thereto, to impose a general mortgage upon all his property and an express obligation upon the future crops. Thus is effect given to each phrase of the instrument.

(5) The evident intention of the parties and the character of the instrument as above explained are further carried into effect by a provision at the close that "the opportune annotation be taken of this instrument by the register of mortgages of this district, within the legal time of thirty days," etc.

It is evident from a mere perusal that the translation of this instrument whose meaning is in controversy is not entirely smooth or skilful, and in the paragraph referred to in (4) *supra* its faults go so far as to affect its clearness and intelligibility. The transcript was prepared under the instructions of counsel for the appellants, without any notice to counsel for appellees as at the time required by the new rules (Record, page 35). It would have been much better had the Spanish of the original been included as well as the

translation, and we think it an excusable liberty to quote here the original of that particular paragraph, which is as follows:

> "Para mayor seguridad de lo expuesto, y sin que la obligación general que hace de todos sus bienes impide la especial ni por el contrario ésta a aquella, el compareciente don Ramón Ruiz, hipoteca, expresa y señaladamente no tan sólo los frutos que en la proxima cosecha elabore la Hacienda Casique, radicada en la jurisdicción de Loiza, como ya queda precisado, sino tambien los que fabrique en los demás cosechas venideras hasta el completo pago de la cantidad que deja reconocida; permitiendo que de este instrumento se tome la oportuna razón por el anotador del ramo de Hipoteca de este Distrito, dentro del término legal de treinta dias, de la cual obligación y sus efectos fueron advertidas las partes por mí el Escribano=Al cumplimiento de cuanto queda escriturado obliga el compareciente sus bienes presentes y futuros con la cláusula guarantigia, contrato ejecutorio, sumision y renuncia de leyes, fueros y derechos á su favor, con la que prohiba la general en forma.="

This original serves to make plain two things which, perhaps, may be clearly enough inferred from the imperfect translation: first, that a negative is to be supplied in the translation of the earlier clause referring to the general obligation, the meaning being that the general obligation of all his property and the special obligation over that described in the instrument were both recognized as existing and enforceable, without either one of them obstructing the application of the other, and, second, that those two obligations, one general, the other special, were to be additional to the express obligation thereby laid upon the crops.

Near the bottom of page 10 of their brief counsel refer to what could or could not be mortgaged under the mortgage law of 1869, but that matter can be in no way pertinent to the present question because the execution and record of

this mortgage took place prior to that date, *i. e.*, in 1865. Nor are counsel entirely right in the statement made in the same connection, near the top of page 11, that "the earlier law * * * proceeds upon the assumption that mortgages can be made only of specific real property." Were this contention correct it would affect the validity as a mortgage lien of only two of the classes of obligations referred to in the instrument: the "general obligation of all property" and the lien on crops, and leave untouched the third, the tacit obligation upon the particular plantation described.

To be at all correct, however, such a statement must be confined to the *recording* laws, and even then it could apply only as affecting the rights of those to whom those laws gave the name of "terceros" (third parties), which substantially corresponds to the *innocent purchaser* of the American law (Batista *vs.* Taboas, 15 P. R., 382).

Escriche, whom we believe to be one of the standard commentators upon the Spanish law, states the effect of the recording laws in his "Diccionario de Legislacion," as follows:

> "Que esta ley ha introducido en nuestro sistema hipotecario la *especialidad* y la *publicidad;* es decir, que la voluntad de la ley, es que no se quedan perseguir, por el acreedor las cosas que le estan hipotecadas por contrato, a lo menos en caso de perjucio de un tercer poscedor, sino cuando la hipoteca recae especialmente sobre una, dos o mas cosas determinadas, y se hizo ademas notoria por medio del registro de modo que pudiera enterarse de su existencia la persona que tratando de celebrar algun contrato con el dueno tuviese interes en conocerla.
>
> "Hipoteca," par. XXIII (4).

(*Translation.*)

That this law has introduced into our system of mortgages particularity and publicity, that is to say, that the purpose of the law is that the creditor cannot pursue the things which are mortgaged to him by con-

tract, *at least to the prejudice of a third possessor,* except when the mortgage specially burdens one, two or more specified things, and moreover is made notorious by means of the Registry, so that its existence may be known to the persons who, seeking to enter into any contract with the owner, might be interested in knowing it.

And, again, in explaining the limitation of the principle that the mortgage affects the mortgaged property in whatever hands it may be found, he says:

"Esta regla tiene lugar en la hipoteca especial, ora sea legal, ora convencional, como igualmente en la hipoteca *general* cuando es legal; * * *

"Mas en la hipoteca general constituida por convención, no puede perseguirse ninguna de las cosas hipotecadas que hubieren pasado á terceras manos, según lo dicho en el num. XXIII de este mismo artículo con arreglo á la ley 3, tit. 16, lib. 10, Nov. Rec."

Id., par. XXXV.

(*Translation.*)

This principle has application to the special mortgage, whether it be created by law or by contract, as likewise to the general mortgage when it is created by law; * * * But in case of a general mortgage created by contract none of the things mortgaged can be pursued *which may have passed into third hands,* according to what has been said in par. XXIII of this same article pursuant to law 3, title 16, book 10, of the Novisima Recopilacion.

Escriche, therein following many decisions of the courts, also recognizes the continued existence and validity of the *general* mortgage (subject, of course, to the above limitations) in the following paragraph:

"Las calificaciones de hipoteca general y especial pueden aplícarse á toda clase de hipotecas, esto es,

á la hipoteca legal, á la judicial y á la convencional. La hipoteca legal ó tacita es con efecto unas veces general y comprende toda clase de bienes, asi muebles como raices, derechos y acciones, como por ejemplo la que tiene la mujer en los bienes de su marido * * * ; y otras veces es particular ó especial, cuando están señalados por la ley bienes determinados sobre que debe recaer, como por ejemplo la que tiene el prestamista en la casa ó nave reparada con el dinero prestado," etc.

Id., par. XXIV.

(*Translation.*)

The division of mortgages into general and special can be applied to all kinds of mortgages, that is, to the legal mortgage, to the judicial mortgage and to the contractual mortgage. The legal or tacit mortgage is really sometimes general and includes all kinds of property, personal as well as real, rights and choses in action, as, for example, that which the wife possesses in the property of her husband * * * ; and at other times it is particular or special, when the law points out specific property upon which it must fall, as, for example, that which the lender possesses upon the house or ship repaired with the money loaned.

We may, therefore, conclude, unless the authority of Escriche be questioned, that mortgages, whether tacit, that is, created by the law alone, or express, that is, created by contract of the parties, may still be either general or special, according to the logic of the circumstances, with the limitation that, when general, the rights conferred by them would not affect "third parties" who might have acquired an interest. Or, in other words, as applied to the present case, the general mortgage expressly given in the instrument in question was valid as against the interest of Ruiz in San José Cacique and the tacit legal mortgage was also valid, provided the character of the indebtedness was such as to create one—*unless* Gallardo or his descendants occupy the privileged posi-

tion of "third persons" under the law, a matter which will be discussed later. Indeed, the existence of the tacit special mortgage, under proper conditions, is admitted by counsel for appellants on page 12 of their brief.

In order clearly to appreciate the state of the laws under which the instrument in question was drawn special reference should be had to the law governing the old "Anotadurias" and to a circular of the Governor General of Porto Rico, dated November 10, 1848, and confirmed by a Royal Cedula of April 11, 1852, referring to loans for sugar plantations. The former will be found in the Novisima Recopilacion, book X, title 16, laws 2, 3, and 4, which were somewhat modified by a Royal Order of May 23, 1845. The circular and cedula referred to will be found in vol. 4 of San Pedro's Compilacion of the Laws of Ultramar, on pages 614 and 625, and we append hereto a translation of the same.

It will be observed that in the law governing Anotadurias there was no provision for the recording of crop mortgages, nor of anything but interests in realty, described as—

> "imposiciones, ventas y redenciones de censos ó tributos, ventas de bienes raices, ó considerados por tales, que constare estar gravados con alguna carga, fianzas en que se hipotecaren especialmente tales bienes, escrituras de mayorazgos ùoobra pia" (law 3, par. 1),

which conforms to the statement of counsel for appellants on page 11 of their brief. It will also be observed that the instrument provides for its recording in the place and within the exact time required by that law, and that it contains the waiver and renouncement of rights provided for in the Royal Cedula of 1852 and was evidently drawn in an attempt to come within it. From these features we think it may be conclusively deduced that a mortgage of the crops was not its only effect, but that the parties intended to mortgage the realty and *thought* they were doing so—as we believe they did in law.

To sum up: we submit that the parties intended to describe in this instrument three kinds of lien, the tacit lien given by the law under contracts of refaccion, the express general lien upon all Ruiz' property, and the express special lien on the crops. The first existed, if at all, independently of this instrument. The second was created by the instrument and was valid between the parties so far, at least, as Ruiz' title was concerned and also affected subsequent acquirers of that title to this particular property because this property was described in it and the record was made against it in the Anotaduria. The third is no longer of importance. Our right to claim under the first and second will be supported by the argument to follow.

(*b*) *The instrument in suit, affecting the land, also bound the title of Gallardo.*

We thus narrow the statement of the proposition because, if Gallardo and his heirs be bound, what may have resulted as to other co-owners need not concern us.

The argument to sustain the contrary, found on pages 11 and 12 of appellants' brief, rests largely upon the alleged insufficiency of the allegations of our bill; and, indeed, we think it must rest entirely upon that, because, if the allegations be sufficient, the decree entered upon those allegations taken *pro confesso* is conclusively presumed to have been founded upon proofs sufficient properly to support them and to warrant the decree as entered.

Central R. Co. *vs.* Central T. Co., 133 U. S. (cited by appellants).

We propose, then, to examine the allegations of the bill upon this matter. True it is that Ruiz is alleged to have been at the time of the execution of the instrument only a part owner of the plantation and lessee of the shares of his co-owners, and counsel insists that the further allegation

that "the validity and existence of said indebtedness and its lien upon *said plantation* was so recognized by said Gallardo" is not sufficient even on *pro confesso* to sustain a decree adjudging a lien against the *whole* plantation. This court has, however, decided that the phrase "certain encumbrances" meant *all* incumbrances (Keller *vs.* Ashford, 133 U. S., 610). So the allegation of a "lien upon said plantation" may well be held to mean upon the whole plantation.

But that is not the extent of the allegation. There are further averments, some of which are quoted verbatim in paragraph (2) of our comments on the *statement* of appellants (*supra*, page 3). For example, it is averred that, after Gallardo obtained a possessory title to the whole plantation by court proceedings (not by direct purchase from his co-owners) and upon his application to record that title in the Registry of Property, he was "required to recognize as valid liens and *agree to pay all* such liens as appeared against *said plantation* upon the books of the old registry, *among which* was the lien hereinbefore described."

Surely these allegations, coupled with those on page 3 of the record referring to the recognition in 1883, are sufficient, if supported by proper evidence where an issue is made or without evidence where they have been taken as confessed, to support a decree for the complainant, so far as the question now under discussion is concerned. As this court has said:

> "This is * * * a sufficiently certain, though general, statement of the essential ultimate facts upon which complainant rests its claim for relief. It was not necessary, in such a case, to aver all the minute circumstances which may be proven in support of the general statement or charge in the bill. While the allegations might have been more extended without departing from correct rules of pleading, they distinctly apprise the defense of the precise case it is required to meet."
>
> St. Louis *vs.* Knapp Co., 104 U. S., 658.

In another part of their brief (page 17), in connection with their contention of the insufficiency of the bill's averments to avoid the defense of prescription, opposing counsel for a similar purpose cite the well-known cases from this court of *Thompson vs. Wooster* and *Central Railroad Co. vs. Central Trust Co.*, but those cases do not go to the sufficiency of the *form* of the allegation if the *substance* is there. In the latter case Chief Justice Fuller said:

> "If the allegations are distinct and positive, they may be taken as true without proof; but if they are indefinite, or the demand of the complainant is in its nature uncertain, the requisite certainty *must be afforded by proof*. But in either event, although the defendant may not be allowed on appeal to question the want of testimony or the insufficiency or amount of the evidence, he is not precluded from contesting the sufficiency of the bill, or from insisting that the *averments* contained in it *do not justify* the decree" (133 U. S., 91).

In that case this court was treating of decrees entered upon bills taken *pro confesso*, and the holding clearly is that, where allegations are merely indefinite or uncertain, the requisite certainty may be supplied by proof, and that only where necessary allegations are wholly lacking may the decree be reversed because not justified by the bill.

That counsel for appellants have a like understanding of the import of those cases is shown by their statement following the quotation from *Thompson vs. Wooster* (page 17) that "instead of requiring the complainants to 'furnish proofs' * * * the court proceeded to a final decree as a matter of course," etc. Here is where counsel fall under a misapprehension. There is nothing in the record to support such a suggestion. On the contrary, although appellants saw fit to omit from their record any showing as to evidence or lack of evidence adduced in support of the bill upon the presentation of the application for final decree, the court will find from a perusal of that decree (page 24) that

counsel for defendants below were "given further opportunity notwithstanding said decree *pro confesso* to be heard as to the form of this decree," and that the court was "fully advised in the premises." Then follow two paragraphs devoted to findings of fact, which, we believe, are in all respects sufficient to make definite and certain any uncertainty in the allegations of the bill and to support the conclusions of law derived therefrom, whereby the validity and effect of the instrument as a mortgage was adjudged in favor of complainants; so that it will avail appellants nothing to contend that certain averments of the bill are "vaguely and insufficiently pleaded" where it appears, as here, that those vague averments have been rendered certain and sufficient by findings of fact.

It is true that the customary form is to have findings of fact stated separately from the decree, but this court has held that matter of form will not be regarded "if a sufficient statement finally emerges" (Crowe *vs.* Trickey, 204 U. S., 228), and that such a statement may emerge even from an opinion if its wording demonstrates that it was intended as a finding.

Rosaly *vs.* Graham, 227 U. S., 584.
Lawson *vs.* U. S. Mining Co., 207 U. S., 11.
Putnam *vs.* Day, 22 Wall., 60.

This court said in the last cited case at page 67:

> "The decree, it is true, may proceed to state conclusions of fact as well as of law, and often does so for the purpose of rendering the judgment of the court more clear and specific."

The facts found in support of the allegations of the bill pertinent to the present question are stated in the decree of the court below (page 24) as follows:

> "That on the 22nd day of December, A. D. 1865, one Ramon Ruiz Gandia was indebted to William

Noble, ancestor of complainants, in the sum of eight thousand and ninety-three dollars gold, for which he gave said Noble a mortgage lien, in addition to the tacit mortgage fixed by the law then in force, upon a certain plantation called 'San José Cacique,' situated within this district and hereinafter more fully described, which he agreed to pay during the following year; that thereafter and before paying any portion of said indebtedness the said Ramon Ruiz Gandia became bankrupt; that thereafter one Ricardo Gallardo, the ancestor of the defendants herein, acquired said property from said bankrupt estate subject to various liens and among them the above lien in favor of said William Noble; and that, upon applying for and obtaining the recording of his title to said property in the books of the New Registry of Property in the year 1882, said Gallardo recognized as valid and agreed to pay certain liens on said property and among them said mortgage lien of said William Noble. * * *

And that, by the recognition of the continued existence and validity of said mortgage indebtedness by said Ricardo Gallardo in the year 1882 as aforesaid and subsequently by notarial instrument in the year 1883, the running of the statute of limitations against said indebtedness was interrupted, and, thirty years not having elapsed from the time of such recognition to the date of the beginning of this suit, the right of the complainants to demand the foreclosure of their said lien upon said real estate is a valid and subsisting right;" etc.

So that, in the absence from the record of the evidence taken preliminary to the entry of the final decree or of some showing that no supporting evidence was in fact taken (neither of which appears in the present record), the presumption must be indulged, we submit, that the decree was properly entered.

Collier *vs.* United States, 173 U. S., 79.
Zimmerman *vs.* Harding, 227 U. S., 489.
Torres Zayas *vs.* Lothrop, 231 U. S., 171.

This, of course, is subject to the exception that the bill be found *entirely wanting* in some fundamental allegation necessary to warrant the decree; but we do not understand the opposing argument as going to that extent, nor, if it did, do we think the court would so find.

Since the Civil Government Act of Porto Rico (31 Stats., 77) was enacted this court has repeatedly held itself to be restricted in its review on appeals from those courts to "the sufficiency of the findings to sustain the legal conclusion or decree based on them" (Garzot *vs.* Rios de Rubio, 209 U. S., 283). While the language of that act has been modified by section 244 of the Judicial Code, under which this appeal was taken, we believe the extent of the review has not been enlarged except, perhaps, where the whole evidence is preserved in the record, as we know of no provision of law where findings of facts could be otherwise reviewed, or the propriety of the decree questioned, where neither findings of fact nor the substance of the evidence appeared.

Marshall *vs.* Burtis, 172 U. S., 630.
Chavez de Armijo *vs.* Armijo, 181 U. S., 484.
Gonzalez *vs.* Buist, 224 U. S., 126.

Thus appellants are remitted to their only possible ground of contention, one which has been already stated: Is the bill *utterly lacking* in any of the averments necessary to support the decree? And this question we have already discussed and answered.

(*c*) *Appellants estopped to deny lien of instrument in suit.*

Lastly, we might grant every contention of abstract law made by appellants without it availing them in changing the result, since the very certificates and documents presented by them to the court below show them estopped to deny that this instrument executed by Ruiz to Noble was an incum-

brance on the realty, and that their ancestor acquired it subject to that incumbrance.

We say *estopped* for lack of a better word, as we are not concerned with technicalities and the exact equivalent of that word is not known to the Spanish law. Perhaps it might be better described as a recognition, or an adoption, or a ratification, by Gallardo, of the mortgage lien of this instrument. By whatever designation it may be expressed in English, the circumstances bring it within the principle of the Spanish law, that "no one can contradict his own acts" (*nadie puede ir en contra de sus propios actos*). (Valdes *vs.* del Valle, 1 Dec. de P. R., 25, 34; 60 Juris. Civ., 231 ; 95 Id., 777.)

Take first the certificate of the registrar as to the entries in the registry of property, beginning on page 12 of the record. On page 15 it is certified, first, that the inscription of the plantation "San José de Cacique" (which is fully described) in the name of Ricardo Gallardo (ancestor of defendants) was the *first* inscription of that property in the books of the *new* registry, and, second, that "the above-described property" *is subject to certain incumbrances,* among which the Noble mortgage is described under the letter "C." It is only necessary to examine the mortgage law, which regulated the making of inscriptions of title in the *new* books and the transcription of the entries existing in the old books, to make clear that this inscription of a *possessory title* could be made only at the request of the owner of that title, and that such request involved the obligation on the part of the applicant to enumerate the liens existing on the property and the duty on the part of the registrar to mention those liens in his entry. The pertinent articles of the mortgage law are the following (we use the language and section numbering of the War Department translation of the law as amended in 1893, but the same provisions were contained in the original law of 1880):

> "Art. 2. In the registries mentioned in the preceding article shall be recorded:

"1. Instruments transferring or declaring ownership of *realty*, or of property rights thereto.

"2. Instruments by which rights of use, use and occupancy, emphyteusis, mortgage, annuity, servitudes, and any others by which estates are created, *acknowledged*, modified or extinguished.

* * * * * * *

"Art. 7. When in any instrument or contract any property interest in real estate is *reserved* to persons *who were not parties* to the same, the notary who executes the deed, or, in the absence of a notary, the official who may issue it, *shall require the record* of the said *property right whenever* the interests of said persons *appear* from the instrument itself, or from the *documents and proceedings* upon which its execution was based.

"If the instrument or contract is subject to record, *and this has been requested*, particular mention *must be made* therein of the *property right reserved*, and of the persons in whose favor the reservation has been made.

"Art. 9. Every record made in the registry *shall* contain the following details:

* * * * * * *

"2. The nature, extension, conditions, and *liens of any kind*, of the interest recorded and its value, if it appear in the deed."

* * * * * * *

Then, turning to the title treating of "Records of Possession," as Ricardo Gallardo had recorded a *possessory* title, we find:

"Art. 390. To facilitate the compliance of the preceding article, to owners who lack a recorded title of ownership, no matter at what period the acquisition took place, they shall be permitted to record their interest by previously proving their possession before the judge of first instance of the place where the estates are located, with the consent of the Department of Public Prosecution and citation of the adjacent property owners, *should they desire* to record the absolute ownership of some estate, and with the cita-

tion of the owner or other participants in the ownership, should they desire to record some property right. * * *

"Art. 391. In the preparation of the papers to which the preceding article refers, the following rules shall be observed: First, the document in which the admission of the proceedings is requested *shall contain:*

"1. The nature, location, area, boundaries, name, *and incumbrances* on the estate, the possession of which it is desired to prove.

* * * * * * *

"Art. 392. Should the notice drawn in accordance with the form prescribed in the preceding article be sufficient, and there be no opposition by a person having a right thereto, or such a position as was made having been abandoned, the court shall approve the proceedings and order that the record requested be made in the registry without prejudice to a third person having a better claim.

"The possessor who may have acquired the decree mentioned in the preceding paragraph shall present to the registry, *in requesting the proper record,* the original papers in the case which have been turned over to him for this purpose, being permitted to transmit therewith a copy of the same on common paper, should he desire to keep them, which, after being compared by the register and the certificate of comparison attached thereto, shall be returned to him, the original in all cases being filed.

"Art. 394. *Records* of possession shall contain *all the details* mentioned in article 391, and also the names of the witnesses who may have testified, the result of their depositions, the result of other investigations made in the proceedings, the opinion of the Department of Public Prosecution, and the special circumstances of the record, according to its character, so far as they appear from the papers in the case." * * *

Therefore, reading the certificate of the Registrar as it appears on page 15 of the record in the light of the foregoing

provisions of law, we must conclude that Ricardo Gallardo requested the inscription of his *possessory title*, acquired in the manner prescribed by articles 390-2 aforesaid; that the proceedings in court as presented to the Registrar with his request contained his petition in which were stated the matters prescribed by article 391, one of which was the "encumbrances on the estate"; that when the registrar came to record the title, according to the request, he complied with article 394 by stating in his inscription "all the details mentioned in article 391," one of which was a notation of the "encumbrances on the estate" as contained in the possessory proceedings, and that one of those encumbrances was the Noble mortgage.

The list of encumbrances enumerated in the Registrar's entry was, therefore, but a repetition of those enumerated by Gallardo himself in his petition to the court whereby he had been granted his possessory title; and that petition must have stated that the instrument now in suit constituted an incumbrance or lien upon the whole property. No other conclusion is consistent with the presumption always indulged that public officials, and especially courts, have properly performed their duties and complied with the laws.

Philadelphia, etc., R. Co. *vs.* Howard, 13 How., 307, 332.

Lopez *vs.* Registrar, 15 P. R., 712.

Inchausti *vs.* Registrar, 17 P. R., 566.

Vilella *vs.* Vilella, 18 P. R., 214.

Of course this action would not preclude Gallardo or his heirs from pleading as a defense the *subsequent* running of the statute of limitations so as to bar the claim, a question which is separately treated hereinafter under Point III; but they should certainly be precluded from denying that *at that time* (1882) the indebtedness represented by the instrument in suit constituted a valid and subsisting incumbrance and lien upon the property *as then recorded* at Gallardo's instance.

Such would certainly be the result under the decisions of this and other American courts.

Jerome *vs.* McCarter, 94 U. S., 734.
Swann *vs.* Fabyan, 110 U. S., 590, 601.
Keller *vs.* Ashford, 133 U. S., 610.
Wellington *vs.* Jackson, 121 Mass., 159.

But doubtless the Spanish and Porto Rican decisions should control, as the island was at the time of these transactions under Spanish sovereignty, and those are as numerous as our own.

Finlay *vs.* Finlay, etc., Co., 8 P. R., 371, 391 (par. 11).
Fernandez *vs.* Gutierrez del Arroyo, 10 P. R., 59, 69.
Torres *vs.* Lathrop, Luce & Co., 16 P. R., 172, 181.
(Same case on appeal,) 231 U. S., 171, 180.
Pellicier *vs.* Fernandez, 19 P. R., 111, 117.
Prado *vs.* Estate of Rio, 15 P. R., 489, 494.

The last-cited case was one where such an estoppel was claimed because the defendant had *witnessed* an instrument containing the recital of a fact which he disputed, but the mere acting as a witness was considered insufficient, the court declaring the principle to be that—

> "the law requires some *act or admission* on his part which would show a *knowledge* of the alleged legal tacit mortgage existing in favor of" the complainant.

A practically identical case is found in the reports of the Supreme Court of the Philippine Islands as administered under American sovereignty. There the defendant had been the actor in obtaining a possessory title to lands for the benefit of the plaintiffs, his nephews, and afterwards claimed the property for himself. His action before the court was held to be such a recognition of their rights as estopped him from denying their title.

Broce *vs.* Broce, 4 Philipp., 611.

Moreover this principle is more directly applicable to *heirs* under Spanish than under American law because of the rule of the former that an heir who accepts his inheritance becomes personally responsible to the full extent of his own property for the obligations of his ancestor. (Escriche, "Heredero," pars. I, XV, XVIII.)

We therefore submit that the allegations of the bill must be held sufficient to warrant the final decree.

POINT II.

The Instrument Did Impose a Tacit or Legal Mortgage upon the Plantation Described in the Bill.

The discussion of this point in the brief for appellants is made to rest largely upon the technical legal meaning of the Spanish word "refaccion." It is true that the instrument is described in complainants' bill as a "contract of refaccion," but the real question is not whether that description is technically correct, but whether as against the heirs of Gallardo the instrument did impose in law a lien upon the real estate, or the subsequent acts of Gallardo estop his heirs from denying the existence of such a lien.

If either of those propositions be accepted, as we believe we have above shown they must be, it matters little what may be the proper technical designation of the character of the instrument. Opposing counsel state in their opening paragraph under this point that "the instrument does not so describe itself," that is, does not describe itself as a "contract of refaccion"; but in this we think counsel have been led into error by failing to bear in mind that the language used is the translation of thought expressed in another tongue.

In our discussion of the first *point* we called attention to certain provisions of the instrument which we deemed

especially material, among which that numbered (3) (page 7, *supra*), was intended to cover this particular contention, and we quoted the language from which opposing counsel draw the supposed distinction between the manner of describing the Goenaga mortgage and the one in suit. That language is that the Goenaga mortgage must be paid during October, 1866, "thereby being canceled *that deed of refaccion,* and Ruiz (hereby) obliged not to execute any other agreement or deed with damage to *this present one.*" We think that even in the English it may well be inferred that the two phrases above italicised are placed in juxtaposition as referring to two instruments of similar character, that is, that the word "one" is used in place of and to avoid the repetition of the phrase "deed of refaccion"; but to one familiar with the construction of Spanish that use is much clearer because it is characteristic of that language. In other words, we believe that the scrivener thought he was clearly conveying the idea that the instrument he was writing was a "deed of refaccion" equally with the one to which he was referring. That belief is further supported by the sense of the provision in which it is contained. If this were not such a deed it could not be "damaged" by the subsequent execution of another, while if it was it could be, because the refaccion liens attached in the inverse order of their creation, the money last furnished having the prior right to repayment, like admiralty liens upon a ship (Escriche, "Hipoteca," par. XXIX). But, apart from whether it "so describes itself," we believe that, without straining the intent of the old law, this contract may be construed to be one of "refaccion," because of its character. Opposing counsel merely quote the words of the ancient law and then come forward for their definitions to laws and statutes adopted since the contract was made. So far as authority is concerned they are content with a reference to the opinion of Judge Hamilton and his construction of some of the cases cited to him by the undersigned as counsel

for the Goenaga Succession in the intervention hearing. Let us see whether Judge Hamilton's conclusion is well derived.

Escriche, whom we have before quoted, explains the refaccion lien (hipoteca refaccionaria) as follows:

> "Todas las hipotecas son legales en cuanto la ley arregla la forma y condiciones de su establecimiento; pero se llama particularmente *legal* la que sin estipulación de las partes ni condenación judicial resulta precisamente de la ley. Dásele tambien el epiteto de *tacita*, porque no es el juez ni el deudor quien la constituye, sino solo la fuerza de la ley que tiene dispuesta preventivamente esta garantia á favor de personas que necesitan de su especial protección ó que presentan una razon conocida de preferencia en el pago de sus créditos. La ley en efecto constituye hipoteca por si mismo, ó porque asi lo exige la calidad de las personas, ó porque interesa en ello el bien del Estado, ó por razon de algun beneficio notable que una persona hizo á otra, ó porque presume que tal es ó debe ser la voluntad del deudor." (Diccionario de Legislacion, "Hipoteca," par. VIII.)

(*Translation.*)

> "All mortgages may be designated as legal, inasmuch as the law regulates the form and conditions of their creation; but that one is particularly called a *legal* mortgage which results necessarily from the law alone without any consent of the parties or judicial compulsion. It is also designated by the adjective *tacit*, because it is neither the judge nor the debtor who constitutes it, but solely the force of the law which possesses already prepared this guaranty in favor of persons who need its especial protection or who present a recognized ground of preference in the payment of their claims. In effect the law itself constitutes the mortgage, either because the character of the persons so requires or because the good of the State is involved in it, or because of some notable benefit which one person has caused another, or because it presumes that such is or ought to be the wish of the debtor."

Thus it is explained that the language of the old *Partida* merely stated a principle which is to be applied to varying circumstances as they may arise, and that is exactly what the Supreme Court of Spain has repeatedly held.

Take, for example, one of the cases referred to, but its meaning apparently ignored, by Judge Hamilton in his opinion: that decided on October 11, 1894, and reported in 76 *Juris. Civil de Esp.*, 196. That case involved the enforcement of a lien for the furnishing of tubing to the Water Works Company of Barcelona, and it has the rather interesting coincidence that the company which had contracted the debt was also a bankrupt, and the real defendant was a corporation which had acquired title to the property through that bankruptcy. The two pertinent principles there announced as applied to the case at bar are (1) that the contract need not be with the owner at the time of the enforcement of the lien, and (2) that a lien results upon the benefited property ("finca refaccionada") for any indebtedness which may have been applied to the purchase, construction or repair of ships, the building of houses, the purchase of land or *other similar things* ("que hayan servido para comprar, fabricar ó reparar nave, ó edificar casa, ó comprar tierra ú *otras cosas semejantes*"). So its application is not confined to the enumerated classes of cases, but extends to money devoted to "other similar things," that is, the lien follows the money into that thing in connection with which the money was used.

Another case in which the same principle was applied will be found reported in 18 *Juris. Civil,* 134, decided on July 2, 1868. There a subcontractor brought suit to enforce his lien for a "crédito refaccionario" (refaction debt) for work done by him for the contractor in the building of a railroad. The defendant railroad company set up that it had no contract with the plaintiff and that the work done was not such as to give a lien. Plaintiff asked for the annotation of the suit in the registry of property so as to preserve his rights

pending the suit, which the company opposed on the ground that he showed no right to a lien against real estate, which was the only kind of a lien allowed to be recorded. The lower court refused the annotation, but the Supreme Court reversed that decision, holding (1) that the mortgage law confined the right of annotation in its records to those whose claims affected some right in real estate (derecho real); (2) that the plaintiff in that case was included within the class specified, and (3) that, as plaintiff's claim did constitute an interest in real estate, the refusal of the annotation deprived him of a substantial right.

In addition to the direct application of the cited case to the case at bar it is important as directly holding that the mortgage law in force in the late 1850's (which was the same in force in 1864) allowed the record solely of contracts affecting the *real estate,* and that the contract, in order so to affect the real estate benefited by the money, need *not* be made with the *owner.* This latter proposition is directly stated in many other cases (Juris. Civil, vol. 18, pp. 570 and 612) and entirely meets Judge Hamilton's contrary conclusion in paragraph 3 of his opinion (page 27).

If, therefore, only contracts affecting interests in real estate were admissible to the *record of mortgages,* the express agreement of the parties in this instrument that it should be recorded in that record is persuasive evidence that *they* at least *intended* that it should affect the real estate and bind the owners thereof.

Another case in point is a decision of the same court on May 26, 1888, on an appeal from the Audiencia of Cuba, reported in *63 Juris. Civ., 837.* The facts were that in 1872 a man named Fournier died in Cuba possessed of a sugar plantation and other property and leaving a will under which his son was named as his heir and one Thaureau was to receive a legacy. After testator's death his executors made a contract with the firm of Brooks & Co. to furnish supplies for the plantation and the indebtedness

thereunder was in due time liquidated in a notarial document exactly as in the case at bar. An express mortgage was then given by the heir, but as that could bind only his interest, it was clearly inferior to the rights of the legatee. The debt not being paid, Brooks & Co. brought suit to foreclose, basing their claim to a lien upon the character of the debt as well as upon their express mortgage, and the legatee Thaureau intervened, questioning the preference claimed by Brooks & Co. in the real estate. The Cuban court sustained the contention of Thaureau, but the Supreme Court of Spain reversed that decision and upheld the contract as conferring a privileged lien upon the plantation, saying, among other things:

> "Moreover, there being conceded by the old legislation, applied in the present case to the refaccion creditors, a *tacit mortgage and preference* upon the thing subject to the refaccion superior to all the creditors who were not specially privileged, legatees not being included in this category, the decree appealed from, in giving to a claim of this class which the intervenor (Thaureau) presents a preference over that of said firm, which is not denied to be one of refaccion, violates laws 26, 28, and 29, title 13, partida V."

Hence the Audiencia of Cuba was directed to reverse the trial court and cause it to enter a decree confirming the foreclosure of the indebtedness of Brooks & Co. as a lien upon the plantation. It seems difficult to distinguish that case in principle from the case at bar, as throughout the colonial legislation the same land laws have been made applicable to Cuba and Porto Rico. In that case the contract was made by executors of a will, parties having only a special control over or interest in the property; in the case at bar by a part owner in possession as lessee. There the party contesting the validity of that lien was a special beneficiary under the will of the owner; here the contestants are general beneficiaries as heirs of an intestate owner. In each case the money was applied, though in different ways, to the payment of obligations directly connected with the property.

It has thus been demonstrated, we think, that the instrument in suit comes within the general class recognized as "créditos refaccionarios" as defined by Escriche and applied by the decisions of the Supreme Court of Spain and governed by the provisions of the Royal Cedula of April 11, 1852, requiring their liquidation and registry in the "Anotadurias." But, whether so or not, we return to our insistence that these defendants, as heirs of Ricardo Gallardo, are estopped to deny that "San José de Cacique" is subject to a lien under the instrument in question for the reasons set forth in the last subdivision of the previous point.

POINT III.

Defense of Prescription Not Sustained.

The great trouble with the argument for appellants upon their contention of prescription is that, when the condition of the record is taken into account, very little of it is material. Their argument glides along smoothly without a single reference to the record which they have brought here.

In the first place, we take it to be settled law that the defense of prescription, or the running of a statute of limitation of actions, is one which from its nature, if not pleaded, is waived.

Shields *vs.* Shiff, 124 U. S., 351, 357.
Burnett *vs.* Desmornes, 226 U. S., 145.
Banco de P. R. *vs.* Font, 14 P. R., 561, 569, top.

And that rule applies to suits in equity as well as those at law where they are of "concurrent jurisdiction," that is, where the appeal to equity is made because of the kind of relief sought, not because of the nature of the right—and a foreclosure suit is one of that class.

Jones on Mortgages (5th ed.), secs. 1172, 1214*a*, *b*.
Sanger *vs.* Nightingale, 122 U. S., 176, 183.

The plea interposed in the present case was to the "whole of the bill" and its substantial paragraphs were in the following words:

> "That the cause of action herein, if any ever existed, which defendants deny, accrued in the year 1865; that said cause of action, if any ever existed, which defendants deny, is a demand that has long time since been and is now barred and is extinct by law and especially by article — of the Mortgage Law of May, 1880, article 134 of the Mortgage Law of May 26, 1893, and articles 1864, 1865, clause 3 of article 1867, and 1840 of the Civil Code now in force in Porto Rico, and by articles 1963, 1964, clause 3 of 1936 and 1939 of the Civil Code of Porto Rico of 1889.
>
> "That the plaintiffs ought not to have or maintain their suit herein, for that if any cause of action ever existed against these defendants, or any of them, the same accrued more than thirty, twenty, fifteen and five years respectively, prior to the time of the bringing of this suit," etc.

This plea was "set for hearing" by the complainants, and upon that hearing was "overruled" (Record, pages 7, 32). Unless there was error in that ruling, this point cannot be upheld, and we think the ruling below can be sustained on several grounds:

First, the plea was bad in form—duplicitous or double.

In equity a double plea is never allowed except by special permission of the court. This record shows no permission granted, or even asked, to file such a plea. Each statute pleaded constituted a separate defense and should have been pleaded in a separate plea—if the court had given permission for more than one plea.

McCloskey *vs.* Barr, 38 Fed. R., 165.
Benson *vs.* Jones, 1 Tenn. Ch., 498.
Saltus *vs.* Tobias, 7 John. Ch., 214.

And upon a hearing as to its sufficiency, if a plea be found double, it should be overruled.

Sharon *vs.* Hill, 22 Fed. R., 28.

Second, the plea was insufficient because upon its face it stated no defense to the averments of the bill as made.

The bill alleged an interruption of the running of statute of limitations by a recognition of the debt, and the plea contained no denial of that recognition. Any question raised by this plea as it is worded might well have been, and could only properly have been, raised by demurrer because it questions the sufficiency of the bill upon its face as to this question of prescription and alleges no fact denying or avoiding the fact of interruption alleged in the bill. Mr. Foster says in his work on Federal Practice (3rd ed., vol. 1, sec. 131) that—

> "The plea of the statute of limitations is in substantially the same form as a similar plea in an action at law, but no special form is essential. If the bill charge fraud or other matters, which, if true, would prevent the statute from depriving the complainant of relief, the plea must deny them."

The author cites as authority *Stearns vs. Page,* 1 Story, 204; while in *Farley vs. Kitson,* 120 U. S., 303, discussing the effect of a plea, this court said:

> "The allegations of the bill that plaintiff * * * in all things acted honestly and in good faith towards all persons interested in it, *were not denied* by the plea, and therefore, for the purpose of the hearing thereon, *were conclusively admitted* to be true" (page 318).

So here, the allegation of interruption by recognition not being denied was conclusively admitted, for the purpose of the hearing had, and the plea could not have set forth a good defense *unless* the period between the date of recognition alleged

(1883) and the time of the commencement of the suit was sufficiently long to act as a bar. The bill was filed in 1908, so that the period since the recognition was about twenty-five years. But the Supreme Court of Porto Rico, following therein the Supreme Court of Spain, has expressly decided that the only limitation for actions to foreclose mortgages executed in Porto Rico before the year 1880 (that is, before the promulgation there of the first mortgage law or either of the modern codes) is *thirty years*, pursuant to the law in force at the time the contract was executed and unaffected by subsequent legislation.

Suc. of Firpo *vs.* Suc. of Pino, 14 P. R., 100.
Juris. Civil de España, vol. 64, p. 256; vol. 91, p. 107.

The matter of limitation is clearly a rule of real property within the scope of the decisions which make such rules as declared by the local courts conclusive.

Rijos Cordova *vs.* Folgueras y Rijos, 227 U. S., 375.
Dupre *vs.* Mansur, 214 U. S., 161.
Romeu *vs.* Todd, 206 U. S., 358.

Hence, in order to show error in the overruling of this plea it must be held that its allegation of a thirty-year prescription is good, notwithstanding an uncontradicted allegation in the bill of an interruption of the statute within twenty-five years. According to *Farley vs. Kitson, supra,* that uncontradicted allegation was conclusively admitted to be true; hence the plea was insufficient on its face and was properly overruled.

Third, the plea was bad in form because it did not sufficiently set up the only applicable statute of limitation—that of thirty years.

If this court follows the above decision holding that the limitation applicable to this action was thirty years, then this plea presents no defense (even other considerations

apart) because the law fixing that limitation is not referred to in it. The first paragraph above quoted from the plea enumerates the different statutes upon which dependence is placed by the pleader—all of which originated long subsequent to the execution of the mortgage in suit, and no one of which fixed a longer period than twenty years. Counsel for appellants, on page 15 of their brief, quote the proper law (63 of Toro) as incorporated in the Novisima Recopilacion, but that law is nowhere referred to in the plea. In other words, the plea was intended as a drag-net to draw within it all the possible statutes of limitation, yet it failed to catch the only applicable one.

We might leave the argument here as having covered the whole legitimate ground material under the record as presented; but as opposing counsel have presented certain other considerations we will add a word of comment upon some of them.

It is stated that the "alleged recognitions" were "too indefinitely and insufficiently pleaded to tender a proper issue." If so, it was a matter for demurrer or exceptions for insufficiency (under the old rule); but counsel then representing the defendants below seemed to find no difficulty in understanding what was alleged. If by "pleading the terms of the instruments themselves" counsel mean that they must be exhibited to or incorporated in the bill, we know of no such requirement; old rule 26 (then in force) seems rather to discourage such a practice. If the phrase referred to was used with another meaning, we are in doubt just what was meant.

It is next suggested that these allegations of recognition "might more appropriately have been reserved for a special replication" under the old rules. In the first place, we know of no such pleading in the former Federal equity practice as a "special replication." Rule 45 expressly forbids one and rule 66 provides the only replication allowed (Duponti *vs.* Mussy, 4 Wash. (C. C.), 128; Mason *vs.* H. P. & F. R. Co.,

10 Fed., 334). In the next place, rule 21 expressly permits a complainant to "state and avoid by counter-averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant, by way of defense or excuse," and Mr. Foster says:

> "It is often important for the plaintiff to thus meet a defense which he anticipates. For as special replications are not allowed, he may thus save the delay of an enforced amendment of his bill, in order to plead new matter as a reply to a defense in the answer" (Fed. Prac., 3d ed., sec. 76).

As counsel so much insists, it was some forty-three years since the cause of action had originally accrued and, in the absence of an allegation of recognition, the bill would have been subject to a special demurrer on that ground had one been interposed (Mercantile Bank *vs.* Carpenter, 101 U. S., 567), hence the propriety of such an allegation.

Again, it is suggested that "the pleadings are somewhat loose on both sides" because "no replication at all was put in," and from this it is deduced that "on the record the plea of prescription stands admitted in point of fact, and challenged only on the ground of legal sufficiency." Of these several statements only one is correct. It is taking us back to the A B C of equity pleading to point out that no replication was necessary or proper unless complainants desired to *join issue* upon the *facts* alleged in the plea. But there were no facts alleged. The plea merely set up a defense of law. So it was "set for hearing" under rule 33, although it might also have been stricken from the files on motion as being the equivalent of a demurrer.

Furthermore, while the plea surely "stood challenged on the ground of its legal sufficiency," it did not "stand admitted in point of fact," because it contained no *facts* to be admitted; and, even if its allegation of thirty-year prescription be regarded as that of a fact, *Farley vs. Kitson, supra,* rules it and declares it insufficient so long as the effect of

the alleged fact is avoided by an averment of the bill not denied by the plea, as was demonstrated on page 3, *supra*.

Opposing counsel then, upon their page 16, proceed to discuss what was made clear upon "application for leave to answer"; but as that application and all papers connected therewith were filed some five months *after* the overruling of this plea, and as the denial of that application is one of the errors claimed under their point IV, we reserve our comment until that point is reached.

On page 17 of their brief occurs their quotation from *Thompson vs. Wooster*, and their argument regarding the obligation of complainants, in view of the principle there declared, to "furnish proofs," an argument which we have already answered in its appropriate place (*supra*, p. 16).

We believe we have now met and refuted every suggestion, however immaterial it may be, brought forward by appellants in support of their plea of prescription.

POINT IV.

Complainants Entitled to Remedy Pursued and Refusal to Open pro Confesso Not Abuse of Discretion.

Counsel for appellants have here united two entirely distinct contentions, as their argument in support of them shows, and we shall so treat them.

(1) *Complainants were entitled to the remedy pursued.*

Being subjects of the King of Great Britain and Ireland they were entitled to seek the Federal jurisdiction (Ortega *vs.* Lara, 202 U. S., 339), and in that court to pursue any method of procedure conformable to its practice.

Gaines *vs.* Chew, 2 How., 619, 650.

Smyth *vs.* Ames, 169 U. S., 466, 516.

And the procedure followed is the only one known to the Federal court for the foreclosure of mortgages. However, the method of foreclosure outlined in appellants' brief, which is that provided for by the mortgage law itself, is not the exclusive remedy even in the local insular courts. A plaintiff has his option to follow that which is often called the *summary proceeding* or the ordinary procedure of the civil code.

Hernandez *vs.* Fernandez, 17 P. R., 111, 114.
Gimenez *vs.* Brenes, 10 P. R., 124.

Neither is there any force to the other objection suggested by counsel, that the record of the mortgage in the "Anotaduria" had not been transferred to the Modern Registry. It was sufficient that its existence in the old book was *noted* in the first inscription in the new.

Del Moral *vs.* Registrar, 20 P. R., 391, 393.
Navarez *vs.* The Registrar, 10 P. R., 236.
Decision of May 22, 1889, 65 Jur. Civ., 725.

That notation was made at the instance of Ricardo Gallardo; hence neither he nor his heirs can be regarded as "third persons" (the phrase used in the mortgage law in a sense more or less equivalent to the "innocent holder" of the American law), and it is shown by the law as quoted by counsel for appellants (page 19) that the only effect of non-transference is that "it shall not operate to the prejudice of *third persons.*" Moreover, it has been repeatedly decided by the Supreme Court of Porto Rico that such transfer is "unnecessary where the contention is between parties," and that, of course, equally applies to privies in title.

Suc. of Firpo *vs.* Suc. of Pino, 14 P. R., 100, 105.
Hernandez *vs.* Cuebas, 16 P. R., 519.
Batista *vs.* Taboas, 15 P. R., 382.

It is undisputed that appellants possess and claim to own the plantation in question as the *heirs* of Ricardo Gallardo. It was held that heirs are not "third persons" in the above-

cited case of *Hernandez vs. Cuebas* and in many decisions of the Supreme Court of Spain.

Decision of Jan. 28, 1892; 71 Jur. Civ., 99.
Decision of June 6, 1899; 87 Jur. Civ., 402.

It has been further held in various cases by the Supreme Courts of both Spain and Porto Rico that *no one* can be a "third person" who acquires property *with knowledge* of the existence of an incumbrance, even though unrecorded.

Valdes *vs.* del Valle, 1 P. R., 75.
Suris Cardona *vs.* Quiñones, 17 P. R., 614, 643.
Carmona *vs.* Cuesta, 18 P. R., 178, 184.
Cuebas *vs.* Territorial Bank, 19 P. R., 1109, 1112.
Decision of Feb'y 7, 1896; 79 Jur. Civ., 252, 260.
Decision of May 13, 1903; 95 Jur. Civ., 773.
Decision of March 24, 1905; 100 Jur. Civ., 679.

There is still another consideration why appellants may not be regarded as "third persons." Holding as heirs of Ricardo Gallardo, their rights can be no greater than his would have been, and *he* could not have claimed the benefit of that condition because he acquired the title to the plantation *before* the new registry was created.

Diaz Caneja *vs.* The Registrar, 5 P. R., 175, 183.

It might also be suggested that appellants are estopped to deny due registration, as their ancestor assumed payment of the debt.

Patterson *vs.* de la Ronde, 8 Wall., 292, 301.

For all the foregoing reasons it can make no difference that no transfer of the actual inscription *in extenso* of said mortgage had been made to the modern books.

But on page 20 of the brief for appellants a point is made of the refusal of the registrar holding office in 1906 to record this instrument in the modern books. Even Judge Hamilton recognizes that there is nothing in that (their brief, page

29), and he could not well do otherwise under the decisions. The presentation of that petition to the registrar at that time was entirely superfluous, except as against the chance that appellants might attempt to sell and convey the plantation to a purchaser who *might* perhaps become a "third person," though even that is doubtful. The provision there cited for appellants allowing appeals from refusals of registrars to record instruments is for the benefit of those to whom the *recording* is the important matter. But that remedy is not exclusive; the bringing of a suit with its *lis pendens* may answer the same purpose. Those appeals from the decisions of registrars, like the decisions themselves, are always *ex parte,* have none of the elements of *res judicata,* and were not intended to interfere with the independent investigation and determination by the courts of the legal questions involved.

Ramirez *vs.* Registrar, 16 P. R., 330.
Fernandez *vs.* Registrar, 17 P. R., 1021.
Martinez *vs.* Registrar, 18 P. R., 488.
Decision of Dec. 30, 1896, 80 Jur. Civ., 907.

Indeed, if the rulings of registrars were to be considered determinative of the law, appellees would be safe, since the first registrar in 1865 considered the instrument entitled to record as a mortgage and *recorded it,* the registrar of 1882 (custodian of both the old and new books) coincided in that opinion and *noted it as a mortgage incumbrance,* while the registrar of 1906 alone differed from them and refused to record it, interpreting it as a lien on the *crops alone.* It being admitted by appellants (brief, pages 10, 11) that the ancient and modern recording laws equally excluded from the records instruments not affecting the real estate (*bienes raices*), it must follow that the action either of the two former registrars or of the last one was erroneous. It is submitted that, if any consideration is to be given to the action of these registrars, it must be in favor of appellees, since not only

were the rulings two against one in favor of our theory of the effect of the instrument, but the rulings in our favor were also those of registrars serving during the epoch in which the old law was in force; and it must be admitted that, in interpreting and applying the law of any epoch, the officials incumbent during that epoch would be more likely to interpret and apply correctly both the law and the meaning and effect of instruments drawn under it.

So it appears that this suit was maintainable in the courts of Porto Rico as well as in those of the United States, using the form of procedure suitable to the respective court; that a bill in equity is the only suitable procedure in a court of the United States; and that the question of the recording of the mortgage is not material.

(2) *Refusal to Open Pro Confesso Not Abuse of Discretion.*

Counsel for appellants recognize that the rulings upon motions of this kind are "to be regarded as a matter of discretion and not reviewable here" (brief, page 21), but in addition to the reasons just discussed they state on the same page and on page 16 two reasons why that discretion was here abused: (page 16) because the recognitions of the debt in 1882 and 1883 were shown to be insufficient by the records presented by defendants; and (page 21) because "before the entry of any final decree the existence of several complete defenses" was demonstrated by defendants. Let us consider these grounds in their order.

First, did these records prove the recognitions alleged to be insufficient in law to stop the running of the statute of limitations?

We have already discussed under point I-*c* the effect of that part of one registrar's certificate contained on page 15 of the record and, we think, have there made clear that, far from the entry there certified being "a mere recital by the recording office" and "not executed or assented to in any way

by the new owner," it was a recital required by law to be made at the request of the "new owner" and taken from the statements of such new owner in a petition presented by him to the court for the purpose of obtaining the very title of which he was requesting the recording. How could a recognition be made more solemn or binding?

It may be well here to advert to a misprint in this paragraph on page 15 (which begins with the word "First"), though no point is made of it in appellants' brief. Just previous thereto it is explained that the inscription was made by Gallardo "subject to the following incumbrances," and the purpose of this paragraph is to describe those incumbrances. The third incumbrance specified is designated by the letter "C" and described as "a mortgage in favor of Don Guillermo Noble for sixteen thousand one hundred and eighty-six crowns (escudos) 26 hundredths." At this place an error of omission has evidently occurred in the copying, as the next words "in favor of Don Pedro David," etc., must refer to another mortgage because it goes on to describe it as "inscribed at folio 121, number 242," while the bill alleges that the Noble mortgage is inscribed at folio 7 under number 11, the correctness of which is proven by the second certificate of the registrar (page 16).

In addition to the paragraph already discussed this certificate, beginning on page 12, contains only four matters: a recital of the preventive annotation made on the presentation of the Noble mortgage for record by one of the appellees and its refusal by the registrar in 1906 (pages 12-14), the cancellation of that annotation (page 14), the detailed boundaries of the plantation (pages 14-15), and the *lis pendens* of the present suit (pages 15-16). None of these affect the present question.

Thus it is seen that, so far as this certificate is material, it substantiates, instead of contradicting, the allegation of the bill (page 2, middle), that—

> "thereafter said Gallardo obtained from the proper court a possessory title as owner of said plantation and, upon applying for the registry of said title in the year 1882, he was required to recognize as valid liens and agree to pay all such liens as appeared against said plantation upon the books of the old registry, among which was the lien hereinafter described, and that the validity and existence of said indebtedness and its lien upon said plantation was so recognized by said Gallardo, as appears duly noted in said registry in book 2 of Loiza, folio 2, estate No. 48, first inscription";

that being the inscription referred to in the certificate as "subject to the following incumbrances," one of which was the Noble mortgage.

The second certificate from the registrar (page 16) consists simply of a verbatim copy (in translation) of the record made of the Noble mortgage in the old "Anotaduria" and was doubtless presented on the theory that it supported appellants' contention as to its being only a lien on the crops. But the language does not warrant that conclusion when read in the light of the law as then existing, as has been already explained. Naturally it specifies only what was specified in the instrument itself as to the *express* lien, also showing the liquidated amount of the debt and the name of the plantation affected by it (the name being one of the recognized methods of description), leaving it to the law to *imply* the tacit lien given in such cases for the reasons hereinbefore discussed. In other words, we are simply brought back to the question of the character and legal effect of the instrument itself. It was at any rate *recorded as a mortgage* which, in view of the admission of counsel for appellants that the purpose of the "Anotaduria" was limited to the record of *interests in real estate*, should carry with it the presumption that it constituted such an interest. Such record was at least notice to the world that such an interest was claimed, and the legal effect of the instrument

is to be determined by its own terms, not by the language of the registrar (80 Juris. Civil, 907, already cited).

It will, of course, be gathered from a reading of these certificates that the entries in the registry were not verbatim copies of the instruments recorded, but *abstracts of their substance* to be made by the registrar according to his best judgment of their meaning. The real record of the instrument was in the protocol of the notary who had drawn it, reference to which is always made in the entry.

The only remaining document is the "Acquittance" (pages 17-19). It is a notarial document executed by Ricardo Gallardo and certain third parties, described as trustees of the bankrupt estate of Ruiz. As hereinbefore stated, it was produced by appellants to support an allegation of payment of the Noble debt, made in the affidavit presented with the motion to open the *pro confesso*, and the primary object of the parties to it doubtless was to release Gallardo from the debts described therein. The amounts of the two debts are similar, but the different places of inscription and names of creditors demonstrate that it was a debt due to Turull which was released. So it can have no bearing as a defense. Yet it is one of the documents material in showing a recognition of the Noble debt in 1883. It describes the plantation and the place of inscription of Gallardo's title in the registry—the identical inscription of the certificate on page 15. Then it contains, in its paragraph "second" (page 18) the admission that "at the time of entering said inscription of possession there *were charged to the above-described property* several liens to which *the same was subject*, according to the books of the old 'Anotadura' of mortgages, amongst which there is" that of Turull, which was thereby released. In the following paragraph ("third") there is the further admission that Gallardo recognized himself as being "the owner of the property *subject to the liens thereon.*"

This admission that at the time of the inscription of the property it was subject to the "several liens" charged to it,

coupled with the direct reference to the book and page of such record where those "several liens" are enumerated, cannot be less than a recognition of the then existence of those liens, one of which was that now in suit, and a ratification of their validity; and even the direct assumption of its payment is indicated by his further statement that "he has been paying the same on different instalments." It was because of this admission that the court below, although defendants alleged no proof of any specific payment, limited the recovery of interest to the date of recognition which otherwise would have been reckoned from maturity of the debt.

Altuna *vs.* Ortiz, 12 P. R., 318.
Suc. of Firpo *vs.* Pino, 14 P. R., 100.
Decision of Oct. 15, 1874, 30 Juris. Civ., 569.
Decision of July 9, 1888, 64 Juris. Civ., 255.

Having thus analyzed and made clear just what these records did show as to recognition, we reach the inquiry, Was that recognition legally sufficient to stop the running of the statute of limitations?

It is easy to cite conclusive authority that it would be under the American law.

Jones on Mortgages (5th ed.), secs. 1196, 1201.
Barned *vs.* Barned, 21 N. J. Eq., 245.
Cook *vs.* Parham, 63 Ala., 456.
Kellogg *vs.* Dickenson, 147 Mass., 432.
Palmer *vs.* Butler, 36 Iowa, 576.
Moore *vs.* Clark, 40 N. J. Eq., 152.
Hughes *vs.* Edwards, 9 Wheat., 489.

While the Spanish authorities are not so numerous we believe they cover the same ground in principle.

Decision of July 14, 1871, 24 Juris. Civ., 369.
Decision of Jan. 12, 1893, 73 Juris. Civ., 45.
Prado *vs.* Estate of Rio, 15 P .R., 494.

Second. Did defendants present to the court below before the entry of the decree "several complete defenses" or a single complete defense?

We think not. As counsel for appellants refer to these "complete defenses" as "supported by public records," their reference must be to the same defenses which we have already discussed. That is further indicated by the contents of their proposed answer, which they presented on the day of the hearing of their motion and asked leave to file (pages 19-22). A reading will convince the court that it covers or discloses no defenses not already disposed of in the foregoing argument. The idea that these public records disclosed "complete defenses" rests, we take it, upon the mistaken opinion as to their import which we have already demonstrated and needs no further discussion.

However, a few words of comment may not be amiss to indicate more specifically that the answer (page 19) presented no real defense. The first two paragraphs, besides certain admissions of matters alleged and one or two immaterial assertions, consist of averments of legal conclusions which have been already fully discussed. The third paragraph consists of legal conclusions supported by a verbatim repetition of the entry in the old "Anotaduria," which is contained in the second certificate of the registrar, the effect of which has been already commented upon above. The fourth and fifth paragraphs consist entirely of admissions except the denial that Gallardo acquired the property subject to the Noble lien or ever recognized its validity, which is really a conclusion of law and has been already covered by our argument.

Paragraph VI retracts the averment previously made by defendants' then counsel in his affidavit, by admitting that defendants "have no information whatever as to whether or not the said Ruiz Gandia ever paid the said Noble the said sum or any part thereof," and "are not in a position to an-

swer and allege whether Noble's indebtedness and claim against Ruiz was ever proved, allowed and paid by the trustees of the latter's estate." It then repeats the denial that said indebtedness constituted a mortgage lien and sets out the petition of the appellees to the registrar for its transfer to the modern registry and the registrar's denial of the same—matters which have been already discussed and shown not to constitute a defense.

Paragraph VII, and last, again repeats the denial that Gallardo ever recognized the existence of the Noble indebtedness and its lien upon the real estate, a contention which involves nothing new. But we might in this connection call to the court's attention that no defense of prescription or the statute of limitations is made in this proposed answer. The plea in which that defense was attempted had been long before overruled and, in the absence of such a defense in the answer, any allegation regarding recognition was immaterial. So that, any such question having been saved by the ruling on their plea, these averments presented no reason for reopening the case. Nor did that answer suggest any defense founded on the fact that Ruiz was only a part owner.

Finally it may be suggested that, while the bill of complaint waived an answer under oath, there had been no waiver of the rule requiring an answer to be *signed* by the defendants; yet the answer proffered was signed by counsel only. Hence, apart from other considerations, it was not entitled to filing and its rejection could not be considered an abuse of discretion.

We, therefore, submit that appellants have failed to show, under their point IV, any error in the action of the court below.

ADDENDA.

We have thus followed step by step the argument presented on behalf of the appellants. There remain, however, two or three matters worthy of comment to round out our treatment of the subject.

The Excuse of Defendants for Failure to Answer.

It is suggested on page 21 of the brief for appellants that "defendants' failure to answer within the time fixed * * * was due to a very natural and excusable misunderstanding of the situation by their then attorney." We think it was rather due to the failure of their attorney to *pay due attention* to the situation. Let us see what the record shows.

The order *pro confesso* was entered on the 11th day of *July*, 1912. No attempt was made to vacate it until *November 7* following and no papers filed therefor until *November 8*. The petition then filed (page 8) asked that it be vacated for two purposes: to permit the refiling of the demurrer and plea, which had been already overruled, and to permit the filing of an answer.

As to the first object, it need only be said that the filing of a demurrer *with* a plea (both to the whole bill) would be fruitless as to the demurrer, because it would be immediately overruled by the filing of the plea (Story's Eq. Pl., secs. 442, 465; Bates' Fed. Eq. Pr., sec. 207; Farley *vs.* Kitson, 120 U. S., 315), and if the plea proposed were insufficient on its face, as we think we have hereinbefore shown, the refiling could only result in another order overruling them. Moreover, if the first order overruling them was erroneous, appellants will now obtain the benefit of that error on the review of that order.

As to the second object, the petition states that "respondents herein now do tender their answer" and "have a just

and meritorious defense," yet no answer was tendered until the day of the hearing, three weeks later, and we think we have shown that it did not contain such a defense. The only excuse suggested for the five months' delay was that "the court, prior to the departure of the judge thereof to the United States, was busily engaged in various important matters." No specification as to how much of the time the judge was absent nor that, because of being "busily engaged," he had refused to hear counsel in this matter, nor that counsel had ever asked to be heard.

This petition, not itself sworn to, was supported by an affidavit of counsel (pages 9-12) which was stated to contain "the reasons more fully specified" for the delay in filing their answer, which may warrant a word of comment.

The first of these reasons referred to an unsuccessful search by counsel for a certain bankruptcy record in some insular court from which he had apparently *hoped* to show payment. But no statement is made that he had any knowledge or information that it *would* show it, and it was admitted that no such record could be found. Had these allegations been made in an application presented *before* the period allowed for answering had expired it might have appealed to the discretion of the court to grant an extension, but it showed no excuse for allowing the time to expire, and then five months additional, before *making the application*, nor that any benefit to defendants would accrue from granting it.

The second reason related to an alleged oral request for an extension of time made during a conversation with the judge two days before the expiration of the time limited, the result of which was alleged to be that the judge said "he would speak to" opposing counsel about it, but it is not claimed that affiant took the trouble to ascertain whether the judge had so spoken or whether opposing counsel had consented, but asserts that counsel "having brought to the attention of the court the fact that he desired an extension * * * felt as if no formal petition was necessary." We

submit that it is not due diligence for counsel thus to impose upon the court the burden of soliciting stipulations, and the fact that this petition, with such an allegation as a basis, was heard and decided by the same judge with whom the conversation was alleged to have been held indicates either that the judge had a different recollection of its purport or considered that counsel had abandoned his effort by not taking some further step. And, again, there is no suggestion of an excuse for ignoring the situation for five months.

Counsel for appellees desire the court to note that there is no claim that the alleged request of counsel for defendants, or of any such desire on his part, was in fact communicated to or came to the knowledge of opposing counsel until the filing of this affidavit in court.

The affidavit repeats with some elaboration the statement of the petition as to the delay being caused by the absence of the judge and other occupations of the court, but it is no more definite than the petition itself, upon which we have already commented. Certainly whatever slight force those circumstances might have as excusing delay in bringing the petition on for *hearing*, they present no shadow of excuse for five months' delay in *filing* it.

The remainder of the affidavit is taken up with matters relating to the merits of the proposed defense, all of which were repeated in the proposed answer which we have already commented upon, so is not material to the question of excuse for delay, and we submit that the excuse attempted was wholly insufficient.

The Denial of the Motion to Suspend Entry of Decree.

It is suggested on page 21 of the brief for appellants that this ruling "worked grave injustice to the defendants" because Judge Hamilton succeeded Judge Charlton and found in favor of the defendants against the interveners. But who can foresee the future? Many a litigant has suffered from

a change of judges, and *vice versa*. This court is not to determine a question of abuse of discretion by subsequent history or results. The sole question is, have appellants shown that *at the time he acted* such circumstances were presented *to him* as made his action denying their motion an *abuse of discretion*.

The motion (page 23) was filed on the very day the final decree was entered, and it recites that "counsel for complainants *has filed* herein a draft of a final decree." We submit that it was presented unreasonably late; that it contains nothing except an appeal to the court's discretion—a recognition that its granting or refusal was within reasonable discretion—and that this court is not in a position to pass upon its exercise because the subject-matter of the intervention is not contained in this record. We have apart Judge Hamilton's opinion of what questions were involved, but that cannot supply the information which would enable this court to determine for itself whether that was "a lien of the same nature." The petition was not sworn to—as presented in the court below it needed no oath, because it was based upon a record there before that court—but, supported by neither oath nor record here, we believe this court will not attempt to review the exercise of discretion by the court below.

Judge Hamilton's Opinion.

Counsel for appellants consider the opinion of Judge Hamilton, rendered upon a petition of intervention heard after this appeal was taken, of sufficient importance to append to their brief as an exhibit. It must therefore be worthy of some comment, although the question of its correctness cannot be brought directly before this court until our appeal therefrom is heard.

We think, however, that counsel have overestimated the extent both of its possible influence upon this court in the present hearing and of its applicability in their favor upon

the questions of law presented. Indeed, even if its applicability be admitted, the principles involved are decided evenly—two for each side. That is to say, we think Judge Hamilton asserts the following propositions:

1st. The contract is a *refaccion* contract.

2d. It gave a tacit lien upon the realty.

3d. That lien bound only the interest of Gallardo in the land and the extent of that interest did not appear.

4th. The lien could not in any event be enforced because it had become barred by prescription, as the recognition was "too general."

If the third and fourth propositions are erroneous, the first and second would establish the right of appellees to an affirmance of the decree below. Let us see if we have correctly stated the substance of Judge Hamilton's opinion.

1. *Held to be a refaccion contract.*

The direct discussion of this question begins with the paragraph of the opinion numbered 1 (page 24, bottom). No positive conclusion is stated in direct terms, but the whole trend of the discussion is toward the affirmative of the proposition. But subsequently his intent is made plain. For instance, in paragraph 3, near the bottom of page 27, he says, in speaking of the *extent* of the lien—

> "the more especially where, as in *this case*, the party *making the refaccion contract* was the owner of only an undivided interest in the land."

And again in paragraph 6, on page 30, he says:

> "It is true that the contract under the foregoing views was not a mortgage *except to the extent* of the undivided interest in the property."

Thus it is clear that the opinion recognizes the instrument as a *refaccion contract* so far as its *character is concerned.*

2. *Held to give a tacit lien upon the realty.*

This question is especially discussed in paragraphs 2 and 3 of the opinion, and the quotation from the Supreme Court of Spain, 63 Jur. Civ., 837, is evidently taken as settling it; but he thought such a lien should not extend beyond the interest in the land of the party contracting, so he concludes in paragraph 3 (page 27, bottom):

> "It is true that he was in control of the whole property, but the *lien* recitals *should* probably *be limited to the interest which he had*, that is to say, ownership as to an undivided interest and leasehold as to the rest."

The same statement in substance is made in the sentence above quoted from paragraph 6.

So he held in effect that, if Ruiz Gandia had been the sole owner of the plantation, the tacit lien would have covered the whole.

If the two propositions above stated are fairly to be deduced from the opinion of Judge Hamilton, as we believe an analysis of that opinion has shown, and those propositions are correct in law, then it is not difficult to demonstrate the error in his two remaining propositions:

3. *The lien bound only the interest of Gandia, and the extent of that interest did not appear.*

The error involved in the holding that the lien, if one of refaccion, bound only the interest of Gandia has been already demonstrated in our brief in two ways: First, under the settled decisions of the Supreme Court of Spain that such a lien bound the land, no matter what the form of the con-

tract or the interest of the parties to it (*supra*, point II), and second, because of the assumption of that lien and the estoppel to deny it (*supra*, point I (*c*). Moreover, whether erroneous or not upon an issue joined as was done on the intervention before Judge Hamilton, it would have been erroneous so to decree in the case now before this court because of the *pro confesso* entered upon the bill which sufficiently alleged that the lien bound the land as against the appellants (*supra*, point 1 (*b*). We are content to rest this question upon the arguments referred to.

Judge Hamilton does not make clear whether, after finding that the lien bound the *interest of Ruiz Gandia*, he would have denied relief to intervenors as to that interest because the amount of the interest was not alleged, since his conclusion that the whole debt was barred by prescription rendered a decision of the other question unnecessary. It is clear, however, under the authorities that, had the absence of an allegation of the *extent of Ruiz' undivided interest* been the only obstacle to giving the intervenors relief to that extent, they should have been allowed opportunity to produce evidence on that point; and likewise, in the case at bar, if it were not cured by the *pro confesso*, this court should remit it to the court below for that purpose alone.

Jones *vs.* Meehan, 175 U. S., 1, 229.

But of course that question is material only in the event this court should hold the lien confined as against these appellants to the interest of Ruiz Gandia.

4. *Held barred by prescription.*

This is the real ground of Judge Hamilton's decision. We submit that the error of his conclusion in this respect has been conclusively demonstrated in our brief under point III, *supra*, and we have no desire to repeat or add to that argument, all of which was as applicable to the intervention before Judge Hamilton as it is to the case at bar.

We do, however, wish to advert for a moment to the fact that Judge Hamilton in his opinion wholly ignores the recognition and estoppel arising from Gallardo's action in the *obtaining and recording of his possessory title,* which was the recognition alleged to have occurred in *1882* (Rec., p. 2), and confines his attention entirely to the supposed recognition in the "acquittance" of *1883* (Opinion, par. 7, page 30). While we believe, and have supported our belief, that both of these constitute sufficient recognitions (*supra,* point I, (*c*), and point IV (2), we feel that, had Judge Hamilton given due consideration to the recognition involved in Gallardo's course of action consummated by the record of his possessory title, he could not have included it in his description of that contained in the "acquittance" as "too general to amount to an express recognition."

If, then, we have shown that Judge Hamilton was in error on this one point of sustaining the defense of prescription, it must follow that he should have vacated the submission of the case and given complainants an opportunity to specify in their bill, if necessary, the extent of Ruiz's interest in the plantation and to prove the same, and then should have given them relief at least to the extent of that interest—and to the extent of the whole property in case he was in error as to limiting it to the Ruiz interest.

In this respect, however, there is a difference between the record in the intervention and in the case at bar, which we are entitled to have the court bear in mind. We have already adverted to the fact that in the case at bar the question of prescription was raised by *plea only,* being omitted from the answer tendered after the *pro confesso;* while it appears from Judge Hamilton's opinion (page 24) that "several defenses are set up to the bill, among them that the instrument in question was not a mortgage of the land, that the claim *has prescribed,* and has been paid." So that, while Judge Hamilton appears to have been entitled to consider the applicability of prescription generally, this court, on the

present appeal, is limited to the inquiry, Was the *plea of prescription* properly overruled?

In another respect, also, as hereinbefore suggested, a difference should be noted between the state of the record in the intervention decided by Judge Hamilton and that in the case at bar. In the former, according to the judge's opinion, one of their defenses was based upon the part ownership, or rather the *lack of full ownership,* in Ruiz, while in the case at bar *no such defense was interposed or offered.* If the court will again examine the answer submitted for filing at the hearing of their petition to open the order *pro confesso,* it will be seen that the defense was there planted squarely upon the two propositions that the Noble instrument was not a lien upon the realty at all and that Gallardo had never recognized it as a lien in any respect.

We submit, then, that Judge Hamilton's opinion and conclusions are favorable to the contentions of the present appellees except upon the question of prescription, and that upon that question we have shown him to have been unquestionably in error.

Conclusion.

As a deduction from the foregoing argument and authorities, we state the following propositions:

1. The allegations of our bill entitled us to the relief prayed.

2. The instrument attached to our bill constituted a lien upon the plantation "San José Cacique" by virtue either of the tacit refaccion lien or of the express general mortgage made specific as against that plantation by describing it therein and recording it as an encumbrance thereon.

3. The course of action of Ricardo Gallardo in obtaining and recording his title to the plantation expressly subject to that lien and in executing the "acquittance" of August 10, 1883, recognizing the existence of the same constituted such

an adoption and ratification thereof as prevents his heirs from now denying its effect as such, in accordance with the quoted maxim of the Spanish law *"nadie puede ir en contra de sus propios actos."*

4. Such adoption and ratification further constituted an interruption of the statute of limitations of thirty years and prevented the action for foreclosure from being prescribed; and, whether so or not, no defense of the limitation of thirty years was properly interposed or proffered.

5. The answer proffered for filing was not in proper form and presented no sufficient defense to the action.

The decree appealed from should be affirmed.

Respectfully submitted,

ROBERTO H. TODD,
N. B. K. PETTINGILL,
Counsel for Appellees.

APPENDIX.

November 10, 1848.—Circular of the Governor Captain General Fixing Rules for the Sale of Sugar Plantations Which Do Not Possess the Privilege Granted by the Laws of the Indies.

The lamentable state of decadence to which the commerce of this island for some time past has come for lack of confidence which makes each day more and more difficult the transactions between plantation owners and merchants, together with the mutual aid to which solely the prosperity of this soil may be due, have influenced my mind, compelling me at last to hasten my resolution touching certain modifications, already put in force in the neighboring island of Cuba, which are approved in this island by the opinion of all kinds of interests, of corporations, and even of individuals, in the privilege which the sugar plantations enjoy, adopting them, of course, without prejudice to reporting them to HER MAJESTY for her sovereign approbation.

Keeping in view, then, the reasons expounded by the Royal Audiencia as to the utility of this reform in its honored consultive decision of the third of September, 1846, the learned and competent report of the Superintendent of the Royal Treasury, and the declaration of the Economic Society of Friends of the Country and the Chamber of Commerce of Porto Rico, and lastly, not desiring to depart from the gradual and preparatory manner, so to speak, which was employed in Havana, not ordering the total suppression of the privilege, but granting the faculty of renouncing it, benign and favorable as well as discretionary and voluntary, I have decided to establish, in the use of the extraordinary faculties which Her Majesty has granted me for serious and very urgent cases, as I consider the present one, the following rules:

1st. The owners of plantations or sugar factories shall, from the publication of this circular, possess the free faculty to renounce the privilege which is conceded them by laws 4 and 5, title 14, book 5 of the Recompilation of the Indies.

2d. In order that such renunciation be considered valid and completely effective, it must have been made by a public document.

3d. Any creditor in whose favor the privilege may be renounced, if his debt be not satisfied at its maturity, has the right to levy his execution upon the plantation which has been mortgaged to him in order that, in conformity with the law, it may be sold at public auction as a whole and not in parts, so that it may pass under the control of the execution creditor in the same condition in which it existed at the time of the execution.

4th. The sale having been had, the new possessor shall recognize as his own the debts which the estate had against it. Those who should have contracted with renunciation of the privilege shall be paid as the installments may become due; and, in the opposite case, the respective creditors may issue execution against the new possessors in the same manner provided for in the third paragraph.

5th. If the proceeds of the property at auction should exceed the total amount of the debts against it, the possessor who is dispossessed shall be, in order to receive the excess in such installments as may be agreed upon, considered as a creditor for whose benefit the privilege is renounced.

6th. Those creditors who, at the time of the execution sale of the property, should not have had the privilege renounced in their favor shall continue with the new possessor in the same manner as they were with the former, with respect to the means which the law concedes to them for the collection of their debts.

7th. Every plantation or factory for sugar making which may be established in the future shall have no right to the privilege referred to.

8th. The expenses of issuing execution and of the sale of the property shall be for the account of the execution creditor.

April 11, 1852.—Royal Cedula Granting Privileges to the Sugar Plantations.

Doña Isabel II, by the Grace of God and the Constitution of the Spanish Monarchy Queen of Spain, to the Governors, Captain Generals of the Islands of Cuba and Porto Rico, and the President of their Royal Audiencias:

Know ye that, always solicitous to improve all branches of the public administration in those, my faithful islands, and especially those which may tend toward the development of their agricultural resources, I have a special interest in eliminating the burden which is offered to every kind of business by the privilege granted by the laws of the Indies to the sugar plantations without thereby improving the condition of the plantation owners. To this end and bearing in mind what has on various occasions been represented to me by the authorities of both islands I issued on the 2d instant the following Royal Decree, which has been authenticated by the President of my Council of Ministers, Don Juan Bravo Murillo:

> "Taking into consideration the information furnished me by the President of my Council of Ministers, approved by said Council, and after consultation with the Minister of Ultramar, I decree the following:
>
> "Art. 1. The factories which may be established for the manufacture of sugar in the Islands of Cuba and Porto Rico, after the publication of the Royal Cedula, which may be issued for that purpose, will be subject to the Common Law both in transactions and contracts among those living and in the matter of inheritance whether testate or intestate.

"Art. 2. With respect to existing factories, the procedure will be continued in accordance with the decision of the Board of Authorities, dated July 17, 1848, and in Porto Rico according to the Circular of the Government of its Captain General, dated November 10 of the same year, until on the first day of January, 1865, which is fixed as the limit, all the factories shall pass under the common law, in accordance with what is prescribed in the preceding article for those which may be newly established.

"Art. 3. The decision of the Board of Authorities of the Island of Cuba and the circular of the Government of Porto Rico, which remain in full force and vigor with respect to the factories which now exist until January 1, 1865, when the privilege finally expires, shall be understood as supplemented, while in force, by the following provision:

"The refaccion contracts which may be entered into shall be formally executed as a public document at the end of which, whenever it is fully performed, there shall be placed the proper note of cancellation if the debt should have been paid; and in case it should not there shall be certified the liquidation of the amount which remains unsatisfied, without which requisites the refaccion creditor shall not exercise the privileged action which the law grants them.

"As a consequence the same liquidation shall be made annually of the accounts of those who administer this kind of property, whatever may be the cause from which such administration proceeds.

"Art. 4. Laws 4 and 5, title 14, book 2 of the recompilation of the Indies in so far as they are inconsistent with these provisions are hereby annulled.

"Done at the Palace this 2d day of April, 1852.

"It is rubricated with the Royal Hand.

"President of the Council of Ministers.

"JUAN BRAVO MURILLO.

"And in order that what is contained inserted in my Royal Decree may have punctual compliance, I have resolved to issue this my Royal Cedula with which I charge and command thee that thou dost respect and comply, and cause it to be respected and

complied with, for which purpose make provision that it be published and circulated among whom it may concern since thus it promotes the best public service and is my Royal will. Done in Aranjuez on the 11th of April, 1852—I, the Queen—President of the Council of Ministers, Juan Bravo Muerillo."

GALLARDO Y SEARY *v.* NOBLE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

No. 141. Argued January 20, 1915.—Decided February 1, 1915.

A statement of the condition of the record title made by an owner of property in Porto Rico does not necessarily enlarge the scope of an incumbrance mentioned in the statement from what it actually is

or estop the person making the statement; e. g., a reference to a mortgage on crops as being one on the land.

A mortgage on property in Porto Rico held in this case to be one on the crops alone and not on the land.

THE facts, which involve the construction of a mortgage affecting property in Porto Rico and the determination of the question of whether it embraced the land or only the crops, are stated in the opinion.

Mr. Frederic R. Coudert, with whom *Mr. Howard Thayer Kingsbury* was on the brief, for appellants.

Mr. N. B. K. Pettingill, with whom *Mr. Roberto H. Todd* was on the brief, for appellees:

The instrument created a lien on the land; the rule that mortgages must be upon specific real estate is confined to its effect upon rights of third parties.

The instrument bound the title of Gallardo. The allegations of the bill are sufficient. Upon a decree *pro confesso* the question is of substance—not form.

The allegations are supported by findings of fact. In the absence of evidence in the records there is a conclusive presumption that the decree was warranted.

The only open question here is the sufficiency of the findings to support the decree.

The appellants are estopped to deny the lien because of their conduct in obtaining possessory title.

The presumption is that public officials have properly performed their duties.

The instrument imposed a tacit mortgage although described as a deed of refaccion.

The defense of prescription is not sustained, and if prescription is not pleaded, it is waived.

The plea was bad because it was double; also because it states no defense; and also because the thirty-year statute was not pleaded. Prescription is a rule of real property.

The complainants are entitled to the remedy pursued; summary proceedings are optional.

A record of a mortgage need be transferred only as against third persons, and the appellants are not third persons.

The Registrar's ruling is not binding, but if it were the result would be favorable to appellees.

The refusal of the court to open the *pro confesso* decree was not abuse of discretion.

The records did not prove recognitions insufficient.

There was no sufficient defense presented to the court below, nor was the answer presented signed by defendants.

The failure to answer within the time was not excused.

Suspension of entry of decree is a matter of discretion and this record is not in a condition to review its exercise.

Judge Hamilton's opinion held the contract was one of refaccion and that it gave a tacit lien upon the realty. It erroneously held that the lien bound only the interest of Gandia and that it was barred by prescription.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill to foreclose a mortgage annexed to the bill and alleged to create a lien upon the Cacique sugar plantation. It was brought against the appellants, who are the heirs of one Gallardo, a purchaser of the estate. A demurrer and a plea of prescription of thirty, twenty, fifteen and five years were filed and overruled, subject to exception, and thereafter the bill was taken as confessed and a decree entered as prayed. The mortgage was made on December 22, 1865, and the plaintiffs agree that their claim depends upon its being construed to embrace the land. The construction of the instrument therefore is the main question to be dealt with. It is made more difficult by the fact that still, as when the case was here

before, 223 U. S. 65, there is only an obviously inartificial translation in the record, but enough can be gathered to make the result tolerably plain.

The mortgage after reciting a debt due from the mortgagor, Don Ramon Ruiz, to the mortgagee, Mr. William Noble, 'for the payment of the lease' on the Cacique estate goes on to say that the mortgagor 'binds himself to pay the above-mentioned sum to his creditor Noble, with the proceeds of the first crops which may be ground,' &c. It then recites a debt of Ruiz to Goenaga that must be paid in October, 1866, 'thereby being cancelled that deed of refaccion, and Ruiz obliged not to execute any other agreement or deed with damage to this present one.' "For the better security of the aforesaid, besides the general obligation which he hereby makes of all his property hindering the special obligation, neither the special hindering the general, the appearing party hereto mortgages expressly and especially not only the canes which may be ground in the next crop by the Cacique plantation, . . . but also those which it may grind in the following crops, until the complete payment of the amount herein acknowledged." The appellee gives the original Spanish: "y sin que la obligación general que hace de todos sus bienes impide la especial ni por el contrario ésta a aquella, el compareciente don Ramón Ruiz hipoteca expresa y señaladamente no tan sólo los frutos que en la proxima cosecha elabore la Hacienda Casique . . . como ya queda precisado, sino tambien los que fabrique en los demás cosechas venideras hasta el completo pago de la cantidad que deja reconocida." We agree with the appellant that a negative is left out in the translation and that the meaning is: without the general obligation of all the debtor's property hindering the special, or conversely this hindering that. So translated we think it is obvious that the general obligation of all the mortgagor's property is referred to not as the object

or effect of 'this' special one, but as something presupposed. It is in fact the general obligation of all a debtor's property that is incident to the existence of a debt; an obligation which is recognized in some degree by every system of law and shown in ours by the invalidity of conveyances in fraud of creditors, but which in the civil law is more emphasized and expressed. The object of the instrument and the only object is to pledge the crops and to provide for the severance and application of them to the debt—what is called an anticipatory mobilization. *Williamson* v. *Richardson*, 31 La. An. 685, 687. It could not well have gone further seeing that by the allegations of the bill Ruiz owned only an undivided interest in the plantation and was in possession under a lease.

The reference to the cancelling of a deed of refaccion has no bearing upon the nature of the present instrument, although that point was argued. The obligation of Ruiz not to execute any other agreement to the damage of the present one is the well-known general pact *de non alienando* intended to give an additional safeguard to the mortgagee against later alienees of the mortgaged property. Febrero, Part 2, Book 3, c. 2, no. 85. Curia Filipica, Part 2, § 11, no. 11; Tercero Poseedor. *Nathan* v. *Lee*, 2 Martin (La.), N. S. 32. The language means any agreement other than the present—not any deed of refaccion other than the present, and so we need not consider the nature and effect of such deeds in creating, so to speak, a salvage lien. We turn therefore to a so-called acknowledgment that is relied upon as estopping the appellants from denying the operation of the mortgage upon the land. It seems from the bill that Ruiz became bankrupt, that a coöwner, Gallardo, obtained a possessory title, and that on his applying for registry of the same in 1882 he was required to set forth the incumbrances and mentioned among them the mortgage to Noble. But even on the allegations of the bill and still more plainly on looking at the instrument,

which is in the record and is referred to by both parties, this is merely a statement of the condition of the record title. It does not in any way enlarge or purport to enlarge the scope of the original transaction. The mortgage of course bound the land in a certain sense, because the crops were land until they were severed. *Williamson* v. *Richardson*, 31 La. An. 685. But that was the extent to which it bound it, and the recital of it in the registry means no more. At a later date a registrar declined to recognize the mortgage as a lien upon the property, on the ground that it affected only the products to be manufactured in the plantation. He may have been wrong in his law for the reason that we have suggested, but he was plainly right in his construction of the document. There is no other recognition needing mention.

As our opinion is that the mortgage bound only the crops it follows without more that the decree must be reversed.

Decree reversed.